Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

RR, BY HIS NEXT FRIEND ER,
Petitioner,

v.

EL PASO INDEPENDENT SCHOOL DISTRICT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

C. MARK BERRY, JR.
Counsel of record
4171 N. MESA
SUITE B-202
EL PASO, TEXAS 79902
(915) 532-2244
(915) 532-2085 FAX
cmber@att.net

Counsel for Petitioner

March 16, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether a school district that denied a disabled student his procedural and substantive rights to an evaluation may avoid paying prevailing parents' attorney's fees by refusing a consent decree for the relief requested and demanding a private settlement that only offers "educational benefits."

RULE 14.1(B) STATEMENT

A list of all parties to the proceeding in the lower court whose judgment is the subject of this petition is as follows:

Plaintiff-Appellant and Respondent: El Paso Independent School District;

Defendant-Appellee and Petitioner: Richard R., by next friend E.R.

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OPINIONS BELOW

The opinion of the U. S. Court of Appeals for the Fifth Circuit, dated December 16, 2009, is reported at 591 F.3d 417 (5th Cir. 2009), and its judgment, also dated December 16, 2009, are reproduced at Appendix A, *infra*.

The unpublished Order re: Attorney's Fees of the United States District Court for the Western District of Texas, El Paso Division, dated August 22, 2008, is reproduced at Appendix B, *infra*.

The Order Granting Summary Judgment of the United States District Court for the Western District of Texas, El Paso Division, dated July 14, 2008, is reported at 567 F. Supp.2d 918 (W. D. Tex. 2008) and is reproduced at Appendix C, *infra*.

The unpublished Decision of the Special Education Hearing Officer for the State of Texas, dated January 19, 2007, is reproduced at Appendix D, *infra*.

JURISDICTION

The judgment of the U. S. Court of Appeals for the Fifth Circuit sought to be reviewed was entered on December 16, 2009. This petition is timely under 28 U.S.C. §2101(c) and Supreme Court Rule 13.1 and Rule 13.3 because it is filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the U. S. Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. §1254(1).

For purposes of Supreme Court Rule 14.1(g)(ii), the Court of first instance had federal question jurisdiction under 20 U.S.C. §1415(i)(2) and (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Individuals and Disabilities Education Act (IDEA), 20 U.S.C. §1415(i)(3)(B)(i) provides in relevant part:

> In General. In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of costs-
>
> (I) to a prevailing party who is the parent of a child with a disability

20 U.S.C. §1415(i)(3)(D) provides in relevant part:

> (D) Prohibition of Attorneys' and Related Costs for Certain Services.
>
> (i) In General. Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if-
>
> (I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, on the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court of administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

20 U.S.C. §1415(i)(3)(E) provides in relevant part:

(E) Exception to Prohibition on Attorneys' Fees and Related Costs. Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

STATEMENT OF THE CASE

Parents' Efforts to Obtain Services

In August of 2005 the mother of Richard R. referred her 14 year old son to special education at the El Paso Independent School District for an initial evaluation. He had been unable to pass the Texas standardized tests and was otherwise struggling in school. The District refused to evaluate him as required by 20 U.S.C. §1414(a)(1). App. 109a-110a. According to the hearing officer, the school district referred the request to what was called a STAT Committee which was a mere obstacle to parents who wanted to access special education. App. 113a.

On September 26, 2006, Ms. R., as next friend of Richard R., filed a request for a due process hearing with the Texas Education Agency. She alleged that the

school district failed to timely evaluate Richard, had failed to provide her with procedural safeguards, had failed to provide written notice of its refusal to provide a special education referral and had violated "Child Find" provisions of the IDEA. App. 107a.

In her complaint, Richard's mother requested an order requiring (1) a full individual evaluation (FIE), (2) proper written notice, (3) notice of procedural safeguards, (4) an admissions, review and dismissal committee (IEP team) meeting and (5) reasonable attorney's fees. App.107a.

On October 11, 2006, a "resolution meeting" pursuant to 20 U.S.C. §1415(f)(1)(B) was conducted by the parties. The purpose of such a meeting is to allow the parents of the child to discuss the complaint and the facts and the local educational agency is given the opportunity to resolve the complaint to the satisfaction of the parent. 20 U.S.C. §1415(f)(1)(B)(i)(IV). If the complaint is not resolved to the satisfaction of the parent within 30 days of the receipt of the complaint, the due process hearing may occur. 20 U.S.C. §1415(f)(1)(B)(ii). App. 40a.

At the "resolution meeting" the school district tried to resolve the complaint to the satisfaction of the parents by making the following oral offer of a private settlement:

(1) it would conduct a full evaluation of R. R. within 60 days of consent to evaluation;

(2) it would convene an IEP team meeting within 30 days of the completion of the evaluation;

(3) it would continue to comply with applicable federal and state laws regarding prior written notice; and

(4) it would pay attorney's fees. App. 4a.

Ms. R. did not agree to a private settlement and asked that the school district consent to an "agreed order" granting the relief requested. The school district refused an "agreed order" claiming it was not "appropriate because there were factual and legal disputes between the parties." App. 4a.

Later that day, after the "resolution meeting", the school district submitted a separate written settlement offer. It included everything offered at the resolution meeting and included a specific offer of $3,000 as attorney's fees. Again, Ms. R. failed to accept this offer of private settlement. App. 4a.

Rather than voluntarily comply and grant R. R. a full individual evaluation, the school district launched an extensive defense on the merits and jurisdictional grounds seeking to prevent any evaluation. These defenses were denied by the administrative hearing officer, the District Court and the Court of Appeals. App. D, C & A.

The Administrative Hearing

As a result, the matter proceeded to an administrative hearing on November 9-10, 2006. App. 108a. The school district argued at the hearing that there was no dispute between the parties because it was willing to grant all relief requested and the complaint should be dismissed as moot. App. 5a.

The administrative hearing officer found that EPISD had violated Richard R.'s procedural rights under the IDEA as well as its obligations to him under the Child Find provision of the IDEA. App. 99a-103a. The hearing officer ordered:

1. EPISD to convene an ARD Committee (IEP Team) meeting to provide Richard R. a full individual evaluation;

2. The ARD Committee (IEP Team) to review the findings of the FIE.

App. 119a.

The District Court's Orders

In April, 2007, the school district appealed the decision of the hearing officer to U. S. District Court and sought attorney's fees against Richard R.'s parents and their attorney. App. 39a. Richard R. appealed to the District Court requesting attorney's fees as a prevailing party. App. 39a. The cases were consolidated. App. 5a.

On July 14, 2008, the District Court affirmed the Special Education Hearing Officer's Decision and concluded Richard R.'s parents were a prevailing party. App. 103a-104a. There was no finding by the District Court, or the administrative hearing officer, "that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement." 20 U.S.C. §1415(i)(3)(D)(i)(III). App. C & D.

The District Court did find, in response to EPISD's claim that its settlement offer mooted the case, that the offer, if accepted would have denied the parents prevailing party status. App. 62a-63a. The Court further concluded that the settlement agreement would have "precluded R. R.'s ability to enforce the agreement in either the federal or state courts... ." App. 63a.

In August, 2008, the District Court awarded Richard R.'s parents $45,804 as reasonable attorney's fees. App. 37a. Again, no finding was made by the Court "that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement." App. B.

Decision of the Fifth Circuit

The EPISD appealed the District Court's approval of the administrative hearing officer's decision and its award of attorney's fees to the U. S. Court of Appeals for the Fifth Circuit. On December 16, 2009, the Fifth Circuit reversed the ruling of the District Court concerning attorney's fees. The Appellate Court made no mention, however, of the District Court's finding that the administrative hearing officer's decision was correct and that the parents' complaint was not mooted by the offer of a private settlement. It held only that "We need not resolve the issue today whether a party who rejects a settlement offer and obtains from an administrative hearing officer or the district court no more educational benefit than the settlement offered is technically a 'prevailing party'. Instead, we assume, without deciding, that R. R. is a prevailing party simply because he achieved a judicial order of relief, and we consider only whether R. R.'s rejection of

EPISD's settlement offer should affect the amount of R. R.'s attorney's fees award." App. 14a.

The Fifth Circuit then stated a new standard for denying attorney's fees to prevailing parents in an IDEA case:

> Because it is undisputed that R. R. did not achieve any educational benefits beyond what EPISD offered, the question is whether R. R. was substantially justified in rejecting EPISD's settlement offer.
>
> App. 16a.

The Appellate Court made no finding pursuant to 20 U.S.C. §1415(i)(3)(D)(i)(III) "that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement." App. A. Instead, the Court jumped to 20 U.S.C. §1415(i)(3)(E) and disagreed with the District Court, finding that R. R. was not justified in rejecting the settlement offer in order to obtain an "enforceable" order of relief. App. 17a. The reason given was that if the parent had reached an agreement at the "resolution meeting" a federal court would have had jurisdiction to enforce the agreement.

The Fifth Circuit then concluded that R. R. was not substantially justified in rejecting the settlement offer and found that the District Court abused its discretion in awarding R. R.'s parents their attorney's fees. App. 21a.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT'S JUDGMENT DENIES PARENTS OF DISABLED CHILDREN A RIGHT TO ATTORNEY'S FEES

Fee shifting statutes have been an integral part of the civil rights enforcement system in the United States. The U. S. Congress has sought to encourage private enforcement of civil rights laws by making it easier for plaintiffs in these cases to find lawyers who will represent them. Congress intended these statutes "to ensure that there would be lawyers available to plaintiffs who could not otherwise afford counsel... ." Evans v. Jeff D., 475 U. S. 717, 745, 106 S.Ct. 1531, 1547 (1986). In a footnote, the Court also found that "This is not to deny that the threat of liability for attorney's fees contributes to compliance with civil rights laws and that this is a desirable effect." (citations omitted). Id.

Recognizing the desirable effect of fee shifting for parents of disabled children, Congress passed the Handicapped Children's Protection Act of 1986, providing authority for the reimbursement of attorney's fees to prevailing parents in claims brought under the Education of All Handicapped Children Act, now the Individuals with Disabilities Education Act (IDEA). Pub. L. No. 99-372, 100 Stat. 796 (1986). These amendments prohibited an award, however, if, at least ten days before the due process hearing, the school district had made a settlement offer to the parents that the parents rejected and the court or administrative officer subsequently found that the judgment for the parents was not more favorable than the settlement offer, provided the parents were not

otherwise substantially justified in rejecting the settlement offer. 20 U.S.C. §1415(i)(3)(D)(i) (1986); 20 U.S.C. §1415(i)(3)(E) (1986). Because of the turn of judicial rulings as to how one becomes a prevailing party, these two sections now threaten to eviscerate the possibility of an award of attorney's fees to parents whose disabled children have been denied the benefits of the IDEA.

A. The Demise of the Catalyst Theory

The so called catalyst theory developed as a part of the private enforcement of IDEA procedures.[1] Basically stated, the catalyst theory permitted recovery of attorney's fees to parents as a prevailing party if "(1) the plaintiff obtained relief on a significant claim in the litigation; and (2) there [was] a causal connection between the litigation and the relief obtained from the defendants." P. G. v. Bd. of Educ., 124 F.Supp.2d 251, 259 (D. N. J. 2000) (quoting Metro Pittsburg Crusade for Voters v. City of Pittsburg, 964 F.2d 244, 250 (3rd Cir. 1992).

The catalyst theory became a key to the enforcement of parent's and children's rights under the IDEA. By invoking the catalyst theory, prevailing parents were able to obtain attorney's fees and costs as a result of settlement agreements without the requirement of courts or administrative officers creating any form of judicial imprimatur. Before the Buckhannon decision, only the Fourth Circuit had

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[1] This Court's decision in Board of Education v. Rowley, 458 U. S. 176, 102 S.Ct. 3034 (1982) affirmed the Act's emphasis on procedure over substance.

expressly rejected the catalyst theory in IDEA litigation. S-1 & S-2 v. St. Bd. of Educ. of N.C., 21 F.3d 49 (4th Cir. 1994).

In 2001, in Buckhannon Board and Care Home v. West Virginia Department of Health and Human Services, 532 U. S. 598, 121 S.Ct. 1835 (2001), this Court overruled the widespread practice of the circuit courts to award attorney's fees to prevailing plaintiffs in civil rights litigation under the catalyst theory. The Court reasoned that the "American Rule" did not support a catalyst theory and suggested that judgments on the merits and agreements enforceable through a consent decree may serve as the basis for an award of attorney's fees. Id. at 604.

The Court recognized that there was a concern by plaintiffs that the "catalyst theory" was "necessary to prevent defendants from unilaterally mooting an action before judgment in an effort to avoid an award of attorney's fees." Id. at 608. The Court answered this concern by stating that "[i]f a case is not found to be moot, and the plaintiff later procures an enforceable judgment, the court may of course award attorney's fees. Given this possibility, a defendant has a strong incentive to enter a settlement agreement, where it can negotiate attorney's fees and costs." Id. at 609. The current case is testament to the fact that it has not worked out this way, at least for fee shifting cases under the IDEA.

B. The Battle by School Districts to Eliminate Attorney's Fees to Parents

The El Paso Independent School District, joined by Amicus Curiae, the Texas School Boards Legal Assistance Fund and National School Board Association, argued at great length claiming that its settlement offer mooted Richard R.'s case. As the Court of Appeals pointed out, over half of the school district's 59 page brief was spent arguing that R. R. did not present a justiciable case or controversy. El Paso I. S. D. v. Richard R., 591 F.3d 417 (5th Cir. 2009); App. 10a, n. 5.

The Fifth Circuit turned this argument deftly aside by noting that "EPISD itself admitted in its settlement offer to R. R. that "[t]here are genuine issues of fact and law in dispute in this matter; thus, an agreed order is not in order." Id. But even if the case was not moot, a new interpretation of the exceptions to an award of attorney's fees would prevent such an award.

C. The Settlement Predicament Created By The Decision in Buckhannon

The courts have held that the IDEA fee shifting provisions are interpreted in consonance with those in other civil rights fee-shifting statutes. I. B. ex rel. Z. B. v. N. Y. City Dept. of Educ., 336 F.3d 79, 80 (2nd Cir. 2003) (per curiam); J. C. v. Regional School District No. 10, Board of Education, 278 F.3d 119, 123-124 (2nd Cir. 2002). As such, the holding in Buckhannon is applicable to the fee shifting provisions under the IDEA. In its decision in Smith v. Fitchburg Public Schools, 401 F.3d 16 (1st Cir. 2005), the First Circuit applied Buckhannon to a special education case and

found that to prevail on a claim for an award of attorney's fees a party must have received some form of judicial imprimatur on the final result. Id. at 26. The Court held that a judgment on the merits or a court ordered consent decree would be enough to create the required imprimatur. Id. at 27. Such a judgment would include all administrative and civil actions brought under the IDEA. Id. at 22.

In its decision in Richard R. the Fifth Circuit joined the other circuits in holding that, in the IDEA context, a litigant must attain some judicial imprimatur on a material alteration of the legal relationship in order to be a prevailing party. Richard R. at 422; See footnote 3 and 4; App. 8a & 9a. It is now clear, throughout the circuits, that in order to be a prevailing party in an IDEA case, a parent must:

1. Secure a consent decree with the imprimatur of the administration hearing officer or the court; or

2. Receive a judgment from the administrative hearing officer or the court that alters the legal relationship of the parties.

The District Court clearly found that the private settlement extended by EPISD to R. R. fails to meet this criterion:

> The face of the settlement plainly states that EPISD was willing to offer a 'private settlement,' and moreover that EPISD was not willing to negotiate an agreed or consent order. Def. EPISD's Resp. Ex. A at 1. Consequently, R. R. would have been denied prevailing party

status and the entitlement to attorney fees which this status confers.

App. 62a-63a.

D. A Court Order or Consent Decree Must Be Enforceable by Contempt to Grant Prevailing Party Status

A private settlement agreement that cannot be enforced by contempt is not enough to grant prevailing party status. Christina A. Ex Rel. Jennifer A. v. Bloomberg, 315 F.3d 990 (8th Cir. 2003). This is because a judge has the authority to enforce only the terms of a consent decree. "[N]on compliance with a consent decree is enforceable by citation for contempt of court." Local No. 93, Intl. Ass'n. of Firefighters v. City of Cleveland, 478 U.S. 501, 518 S.Ct. 3063 (1986). There is no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt. Shillitani v. United States, 384 U. S. 364, 370, 86 S.Ct. 1531 (1966). Even if there is a court order in some way approving a settlement agreement, it is not enough. Any consent decree approving a settlement agreement must support a citation for contempt, or the parent will not be a prevailing party. Christina A. at 993. See also: J. C. v. Regional School District, supra at 123-124. The El Paso Independent School District refused Richard R.'s offer of an enforceable consent decree offering only a private settlement that could not have been enforced by contempt. Rather than waive their right to reasonable attorney's fees, Richard R.'s parents were forced to obtain a judicial decision enforceable by contempt.

E. EPISD Was Not Required to Prove That the Relief Obtained By Richard R. Was Not More Favorable to The Parents Than Its Offer of Settlement

Though it is clear that the parents of Richard R. were prevailing parties, the IDEA allows, under certain circumstances, exclusion of attorney's fees after an offer of settlement. Pursuant to the IDEA:

> [a]ttorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if-
>
> (I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;
>
> (II) the offer is not accepted within 10 days; and
>
> (III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.
>
> 20 U.S.C. §1415(i)(3)(D)(i).

The school district devotes less than a page of its appellant's brief to this issue.

The District Court correctly found in its decision of July 14, 2008, App. C, that the party seeking relief under the IDEA bears the burden of persuasion, citing Schaffer ex. rel. Schaffer v. Weast, 546 U. S. 49, 57-58, 126 S.Ct. 528 (2005). App. 53a, fn. 15. In the context of Rule 68[2], courts have held that it is the burden of the defendant to show that the settlement offer was more favorable than the judgment. Rieter v. MTA N.Y. City Transit Auth., 457 F.3d 224, 231 (2nd Cir. 2005). At

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[2] Rule 68, Fed. R. Civ. P.:

(a) Making an Offer; Judgment on an Accepted Offer. More than 10 days before the trial begins, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with costs then accrued. If, within 10 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) Unaccepted Offer. An accepted offer is considered withdraw, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) Offer After Liability Is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time-but at least 10 days-before a hearing to determine the extent of liability.

(d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

least one court has held that the settlement offer provision in the IDEA is modeled on Rule 68. Hawkins v. Berkeley Unified School District, 2008 U. S. Dist. LEXIS 94673 (N. D. Cal. 2008). As the Hawkins decision points out, this interpretation is supported by Wright, et al., 12 Fed. Prac. & Proc. Civ. 2nd §3006.1:

> [a]s a guiding principal..., it would be best to view the defendant as having the burden of demonstrating that the offer was superior. Although it is true that the rule itself makes the cost-shifting consequences apply unless the judgment is more favorable, suggesting that the burden to show that the judgment is more favorable should be on the plaintiff, that wording assumes the comparison is not difficult to make. Rule 68 is actually a tool for defendant to use, and defendant alone determines the provisions of the offer. Since defendant has drafted these provisions, the courts generally interpret the offer against the defendant. Consistent with that, the burden should be on defendant to demonstrate that those provisions are in fact more favorable than what plaintiff obtained by judgment.

The Hawkins court also notes that this view, that it is defendant's burden in an IDEA case, is supported by the legislative history for IDEA's predecessor Act. See 132 Cong. Rec. S. 9277 (1986) (co-sponsor Sen. Simon) (stating that a "court should not...enter into difficult attempts to make complex or arbitrary comparisons of different forms of relief" and that, "[f]or a court to deny an award of fees on the basis of a rejection of an offer it must be manifestly clear that the relief offered was as favorable as that obtained."

No such finding was obtained by EPISD as required by 20 U.S.C. §1415(i)(3)(D)(i)(III); only a conclusion by the Court of Appeals that "[b]ecause it is undisputed that R. R. did not achieve any educational benefits beyond what EPISD offered, the question is whether R. R. was substantially justified in rejecting EPISD's settlement offer." Richard R. at 426; App. 16a. Such a standard is not in compliance with the provisions of the IDEA.

F. The Fifth Circuit's Standard That a School District Must Only Offer A Settlement of "Educational Benefits" Denies Parents Rightful Attorney's Fees

The Fifth Circuit did not place the burden of proof under 20 U.S.C. §1415(i)(3)(D)(i)(III) on the EPISD where it belonged. Because attorney's fees are authorized to a prevailing parent as a part of the costs, 20 U.S.C. §1415(i)(3)(B)(i), the school district should be required to show such fees as a part of its offer and convince a hearing officer or court that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement. The Fifth Circuit made no such requirement of the school district.

In its Order re Attorney Fees of August 22, 2008, App. B, the District Court found that a reasonable hourly rate for the parents' attorney's fees was $220.00 per hour. App. 35a. In its Order, the Court pointed to declarations filed by the parents' attorney detailing the hours spent prosecuting the administrative action and defending EPISD's appeal of the special education hearing officer's decision. App. 32a-33a.

If indeed the relief finally obtained, including reasonable attorney's fees, was less favorable than that offered, it would have been a relatively easy process for EPISD to show it. All it had to do was compare the itemized declaration of plaintiff's counsel to the date of the settlement offer. In addition, it would have to consider the time spent by plaintiff's counsel attending the ARD committee (IEP Team) meetings ordered by the hearing officer. (see App. 119a). That is because parents are entitled to attorney's fees not only for filing and prosecuting the complaint but also for attending administratively ordered IEP Team meetings:

> (ii) IEP Team Meetings. Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e).

20 U.S.C. §1415(i)(3)(D)(ii).

But the Fifth Circuit did not require any such showing by EPISD for it to obtain the benefit of 20 U.S.C. §1415(i)(3)(D)(i)(III). It simply gave it the benefit of this statute (cutting off fees to a plaintiff) because Richard R. "did not achieve any educational benefits beyond what EPISD offered..."

If such a standard concerning the fee shifting provisions of the IDEA stands, school districts will be able to deny disabled children the benefits of the Act until challenged by a parent with a complaint for a due process hearing according to 20 U.S.C. §1415(b)(6).

Then the district may simply step forward and offer the "educational benefits" that it has denied. It would not be required to offer attorney's fees. If they accept, parents will have to bear their own fees, not only for bringing the complaint, but also for attending the IEP Team meetings. The school district would have the upper hand in the settlement negotiations. Because it is only a private settlement, Buckhannon would prevent the parents from obtaining prevailing party status and liquidating their attorney's fees. What was allowed under the catalyst theory, separate determination of attorney's fees, is now lost. Surely, this is not what the Court intended in Buckhannon.

II. THE FIFTH CIRCUIT WAS WRONG IN NOT MAKING AN OFFER OF A CONSENT DECREE SUBSTANTIAL JUSTIFICATION TO REJECT A PRIVATE SETTLEMENT

After Buckhannon, the parents' only method of restoring the right to attorney's fees authorized by the IDEA and the catalyst theory is to obtain a consent decree from the school district for the concessions requested or obtain a judicial order. But for parents seeking appropriate educational services for their disabled children under the IDEA, the ruling by the Fifth Circuit leaves them particularly vulnerable to strategic capitulation by school districts. Catherine R. Albiston & Laura Nielsen, The Procedural Attack on Civil Rights: The November 20, 2008 Empirical Reality of Buckhannon for the Private Attorney General, 54 U. C. L. A. L.Rev. 1087, 1108 (2007). As the authors suggest, "IDEA actions primarily seek equitable relief: provision of specific educational services or an appropriate individualized educational program (IEP). So, like other actions for equitable relief, these kinds

of cases are subject to last-minute capitulation as strategy to defeat fee awards." Id.

As another commentator has pointed out, "[p]arents of children with disabilities, who are already placed in a precarious financial situation simply on account of their child's disability, may not have the resources to pursue lengthy litigation with a more powerful school district, which is likely to have vast financial resources at its disposal. Settlement, therefore, is an important tool for the parents of disabled children to use when resolving disputes with schools and, as a result, when obtaining the free appropriate public education mandated by the IDEA." (citations omitted). Keith Greiner, Comment: Judicial Imprimatur Required: Raising the Standard for Awards of Attorneys' Fees Under the IDEA in Smith v. Fitchburg Public Schools, 41 New England L. Rev. 711, 750 (2007). Greiner believed that the decision in Fitchburg, which applied Buckhannon to IDEA, denying prevailing party status to the parent in a private settlement, "turned the values of the settlement process on its head and now requires most parents of disabled children to endure the financial and emotional strain of a full blown administrative hearing or trial on the merits before attorneys' fees may be awarded." Id. The author concludes:

> "For parents, who already carry a heavy financial burden of raising a child with disabilities, an allowance for the award of attorney's fees is vital. Without a means of recouping the substantial attorneys' fees that parents must pay in order to challenge school districts through a state's administrative hearing process, parents and their disabled

children are left, in reality, with no remedy at all." (citations omitted). Id., at 756.

By rejecting the premise that an offer of a consent decree by a parent is substantial justification to reject a private settlement, the Fifth Circuit now closes the window to attorneys' fees left by the First Circuit in Finchburg and slams the door in the face of parents of disabled children seeking their fees.

III. THE OPINION OF THE FIFTH CIRCUIT CONFLICTS WITH TEXAS' DECISIONAL AND STATUTORY LAW APPLICABLE TO THE ISSUE OF SUBSTANTIAL JUSTIFICATION TO REJECT A PRIVATE SETTLEMENT

As the District Court found, "[t]he plain language of the Texas statutes and Texas Supreme Court precedent would have stripped R. R. of the ability to enforce EPISD's private agreement in the state court system as well.[3] Under Texas law, sovereign immunity exists to 'protect the State and its political subdivisions from lawsuits and liability for money damages." Mission Consol. Indep. Sch. Dist. v. Garcia, 253 S.W.3d 653 (Tex. 2008). App. 66a. See also Tooke v. City of Mexia, 197 S. W.3d 325, 328-329 (Tex. 2006).

The decision of the Eighth Circuit in Christina A., supra, made it clear that a private settlement, without

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[3] The District Court had previously determined that the written private settlement offer submitted by the school district after the resolution session, pursuant to 20 U.S.C. §1415(i)(3)(D)(i), would have left the federal courts without jurisdiction to enforce the agreement. App. 66a.

clear judicial consent, would not support enforcement by contempt. Because EPISD refused such imprimatur, R. R. could have only attempted to enforce the agreement under contract law. The District Court found that "[f]or there to be a waiver of immunity from suit in the contract-claim context, the Texas legislature must have waived immunity from suit as to the claim in question by clear and unambiguous language." App. 67a. After further analysis, the Court held that section 271.151(2), Tex. Loc. Govt. Code, prohibited any contractual claim against a school district unless it was for goods or services.[4] App. 69a. According to the District Court, "R. R. could make no such showing", App. 70a, and concluded that "because the private settlement extended by EPISD simultaneously (1) denied R. R. prevailing party status under the IDEA and (2) precluded R. R.'s ability to enforce the agreement in either the federal or state courts, the Court finds that a live case or controversy did and does exist between the parties to this suit." App. 70a.

In its opinion, the Fifth Circuit goes to some length to explain why it disagreed with the District Court's finding that R. R. had an interest in continuing litigation to obtain an "enforceable" order of relief. However, the Appellate Court does not mention the Eighth Circuit's ruling in Christina A., supra, that contempt is not available to enforce a private settlement nor the Texas Supreme Court's decisions in Garcia and Tooke that school districts have

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[4] Texas law declares school districts to be local governmental entities. Tex. Loc. Gov't Code, §271.151(3).

governmental immunity from enforcement of settlement agreements.

Rather, the Court of Appeals relies on a number of cases finding that, under certain circumstances, federal courts have "jurisdiction" to enforce settlement agreements in an IDEA context. The Fifth Circuit settled on 20 U.S.C. §1415(f)(1)(B)(iii)'s grant of jurisdiction to "any State court of competent jurisdiction or in a district court of the United States" to enforce a written settlement agreement reached at a resolution meeting as the vehicle granting jurisdiction to federal courts in this case.[5] Richard R., at 426-428; App. 17a-20a.

But in this case, jurisdiction was not the issue, enforceability was. The Fifth Circuit never disagreed with the District Court's finding that Texas law concerning governmental immunity prohibited enforcement of the proposed private settlement as a matter of contract law. And again, the ruling in Christina A., supra, prohibited enforcement under contempt. There was nothing left for Richard R.'s parents. They would have been in no better position after the private settlement than before; no way to compel the school district to provide the evaluation Richard was entitled to under the IDEA. See 20 U.S.C. §1414(a)(1). In addition, they would have waived their right to attorney's fees.

Surely, such a state law situation, no enforceable relief if you don't complain, no enforceable relief if you

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[5] This is despite the fact that there was no written settlement agreement arising out of the resolution meeting.

do, is exactly what Congress contemplated when it enacted 20 U.S.C. §1415(i)(3)(E) and provided that attorney's fees were still available, even in the face of an offer of private settlement, if a parent was "substantially justified" in rejecting the offer. The Fifth Circuit is wrong in concluding otherwise and effectively denies prevailing parents a right to attorney's fees in Texas.

IV. THIS CASE PRESENTS QUESTIONS OF NATIONAL IMPORTANCE REGARDING THE APPLICATION OF CONGRESSIONAL INTENT AND ENFORCEMENT OF THE IDEA

Until the middle of the twentieth century, the physically and mentally disabled in the United States had been misunderstood and deprived of certain rights that most American's had taken for granted. Buck v. Bell, 274 U. S. 200, 207 (1927). Children with disabilities "were categorically excluded from public schools, based on false stereotype that all were ineducable and on the purported need to protect nonretarded children from them." City of Cleburne v. Cleburne Living Ctr., Inc., 423 U. S. 432, 462 (1985).

Recognizing a change in public attitude, Congress passed the Rehabilitation Act of 1973, which made great strides at integrating the disabled into the mainstream. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355. In 1975, finding that the educational needs of millions of disabled children were not being met, Congress passed the IDEA in an attempt to ensure disabled children would receive a "free appropriate public education." 20 U.S.C. §1400(c)(2)(A)-(E). In 2004, Congress reauthorized the IDEA, recognizing that the continuing purpose of the

IDEA was to "ensure equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647, 2662, 2664.

In 1986 Congress added fee-shifting provisions to the IDEA in response to this Court's decision in Smith v. Robinson, 468 U. S. 992 (1984). These provisions, authorizing prevailing parents to receive attorney's fees from school districts that materially violated a child's rights under the IDEA, are still in the Act. 20 U.S.C. §1415(i)(3)(B)(i). It should be noted, that at the time of the Congressional debate, the catalyst theory was widely accepted and allowed parents who obtained a settlement to receive attorney's fees as a prevailing party. Greiner, supra, at 741.

But since the Court's decision in Buckhannon the fee shifting provision of the IDEA has been destabilized. "Mischievous defendants", as Chief Justice Rehnquist referred to them in Buckhannon (at 608), are now being encouraged to not settle with parents if they request fees. As Albiston and Nielsen point out, "eventual capitulation [by a school district] will defeat a fee award. This holding [John T. v. Delaware County Intermediate Unit, 318 F.3d 545 (3rd Cir. 2003)] encourages stonewalling to wear down parents who are paying the costs of educating their children while education is pending, eventually leading them to accept a program that is less than ideal, contrary to the public policy objectives of the statute." Albiston and Nielsen, supra. at 1110-1111.

"Stonewalling" is precisely what EPISD has done to the parents of R. R. If the decision of the Fifth Circuit is not reversed, "stonewalling" will become the norm. School districts across the country will be encouraged not to evaluate children referred to special education, thus limiting those who receive services. Only if a parent steps forward with a state complaint will they capitulate and propose to provide the called for services. But the parents must pay their own fees. This will be the national result of the Fifth Circuit's holding that the settlement offer must only contain the "educational benefits" requested and need not be enforceable. Richard R. at 426.

> Parents...often need attorneys to assert their disabled children's right to a FAPE... . Despite being called 'administrative hearings' or 'complaints', these proceedings require fluency in English, an ability to understand detailed state and federal statutes, and an ability to present a case with evidence, witnesses, legal motions, and briefs before a hearing officer who will adhere to the evidentiary and procedural standards appropriate to litigation in federal courts. Educational and time limitations make it impossible for the vast majority of parents to proceed with these mechanisms without the aid of an advocate or attorney.
>
> Stefan R. Hanson, Buckhannon, Special Education Disputes, and Attorney's Fees: Time for a Congressional Response Again, 2003 B. Y. U. Educ. & L. J. 519, 548.

The Fifth Circuit's judgment in the Richard R. decision implicates these important issues of enforceability, compliance with Congressional intent to provide a free appropriate public education to disabled children, settlement power for parents and the shifting of attorney's fees. Unless the Fifth Circuit's decision in Richard R. is altered by this Court, parents will lose substantial rights for their disabled children currently thought to be secured by the IDEA.

CONCLUSION

In accordance with the foregoing, Richard R. by his next friend E. R., respectfully requests the Court to grant his Petition for Writ of Certiorari and for such other and further relief to which he may, in equity and good conscience, be entitled.

Respectfully submitted,

C. MARK BERRY, JR.
Counsel of record
4171 N. Mesa
Suite B-202
El Paso, Texas 79902
(915) 532-2244
(915) 532-2085 Fax
cmber@att.net

Counsel for R.R.,
by his next friend E.R.

APPENDIX

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APPENDIX A

REVISED January 7, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-50830

[Filed December 16, 2009]

EL PASO INDEPENDENT SCHOOL DISTRICT

Plaintiff - Appellant

v.

RICHARD R, as next friend of RR; MARK BERRY

Defendants - Appellees

RR, by his next friend ER

Plaintiff-Appellee

v.

EL PASO INDEPENDENT SCHOOL DISTRICT

Defendant - Appellant

Appeal from the United States District Court
for the Western District of Texas

Before KING, DAVIS, and BENAVIDES, Circuit Judges.

KING, Circuit Judge:

The El Paso Independent School District appeals the district court's award of attorney's fees to R.R. under the Individuals with Disabilities Education Act. The district court determined that R.R. was the prevailing party in his suit against the school district because he had won a judicial order granting him his requested relief; the court awarded attorney's fees to R.R. in the amount of $45,804. We assume, without deciding, that R.R. was the prevailing party in this litigation. But because R.R. rejected a written settlement offer that included all the educational relief that he requested and reasonable attorney's fees, we also conclude that R.R. unreasonably protracted the resolution of this dispute and VACATE the award of attorney's fees to R.R. We AFFIRM the dismissal of EPISD's claim for attorney's fees.

I. FACTUAL AND PROCEDURAL BACKGROUND

R.R.[1] claims to suffer from Attention Deficit/Hyperactivity Disorder. Over the past twelve

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[1] R.R. has acted through his parents in this litigation. As a procedural matter, EPISD brought suit against R.R.'s father and R.R.'s attorney. For simplicity, we refer to R.R., his attorney, and his parents as "R.R.," unless otherwise noted or made apparent from context.

years, R.R. has sought special education and accommodative services from the El Paso Independent School District (EPISD) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* R.R. has been evaluated several times for special education services, admitted to special education programs, and assisted in his education through the provision of accommodative services.

In 2005, R.R. was struggling in school, despite receiving accommodative services that included test preparation and study skills assistance. Later that year, after failing the Texas standardized skills assessment test for the third consecutive year, R.R. requested an evaluation for special education services. In response to this request, the school district set up a committee to evaluate R.R.'s academic placement. The committee determined that because R.R. was very close to passing the Texas standardized skills test, there was no need to either evaluate him for special education or change his current academic placement and accommodative services.

In 2006, after R.R. again failed the Texas standardized test, R.R. requested a full evaluation to determine his eligibility for special education services. In response, EPISD scheduled a meeting for September 25, 2006, to address R.R.'s request. On September 25, R.R. cancelled the scheduled meeting and, on September 26, filed a request for a state due process hearing. In that filing, R.R. sought an order from the Texas Education Agency Hearing Officer directing EPISD to (1) perform a "full independent evaluation" of R.R.; (2) provide written notice to R.R.'s parents whenever the district proposed to change R.R.'s status, accommodations, or evaluation report;

(3) provide notice of procedural safeguards to R.R.'s parents; (4) conduct an Admissions, Review, and Dismissal Committee (ARDC) meeting; and (5) pay reasonable attorney's fees.

At the required pre-hearing resolution meeting,[2] held on October 11, 2006, EPISD contended that there was no dispute between the parties because it was willing to provide all requested relief. Specifically, EPISD offered to (1) conduct a full evaluation of R.R. within sixty days of the parents' consent to evaluate; (2) convene an ARDC meeting within thirty days from the completion of the evaluation; (3) continue to comply with the applicable federal and state laws regarding the provision of prior written notice and procedural safeguards to parents; and (4) pay attorney's fees. At the meeting, EPISD asked for a quantification of R.R.'s attorney's fees. R.R. did not quantify his attorney's fees demand and instead asked for an "agreed order." EPISD demurred, contending that an "agreed order" was not appropriate because there were factual and legal disputes between the parties. R.R. then left the meeting.

Later that day, EPISD formalized the offer made at the resolution meeting in a written settlement offer faxed to R.R. The faxed letter included everything offered at the resolution meeting and initially suggested an attorney's fee award of $3,000. However, EPISD stated that it "remain[ed] ready to negotiate a

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[2] This meeting is held during the "resolution session," 20 U.S.C. § 1415(f)(1)(B), and is described under the heading"preliminary meeting," *id.* § 1415(f)(1)(B)(i). For clarity, we refer to this meeting as the "resolution meeting."

private settlement, and in so doing, . . . [requested] the amount of attorney's fees that w[ould] be necessary to finalize the settlement." Rather than continue negotiating, R.R. refused EPISD's settlement offer, did not make a counter-offer, and proceeded to a due process hearing.

At the due process hearing in November 2006, EPISD reasserted that there was no dispute between the parties because it was willing to grant all requested relief to R.R. As such, EPISD argued that R.R.'s complaint should be dismissed. Notwithstanding this argument, the state hearing officer conducted a two-day hearing on the issues presented in R.R.'s due process complaint. After the hearing, the hearing officer made factual findings and entered judgment in favor of R.R., ordering EPISD to conduct a full evaluation of R.R.

In April 2007, EPISD and R.R. each filed suit in district court under the IDEA. In its suit, EPISD argued that the hearing officer's refusal to dismiss R.R.'s complaint was error because the complaint was non-justiciable. As a result, EPISD urged, R.R.'s subsequent litigation was frivolous, and the court should award EPISD attorney's fees. R.R. also sought an award of attorney's fees, asserting in his complaint that, based on the state hearing officer's ruling, he was the prevailing party. The two suits were subsequently consolidated.

R.R. moved for summary judgment on the prevailing party issue in July 2007. The district court held that R.R. was justified in rejecting EPISD's settlement offer and continuing his litigation to obtain an "enforceable order." As part of this holding, the

district court determined that there was a justiciable dispute before the Texas hearing officer because EPISD had not offered an enforceable settlement. Specifically, the district court concluded that EPISD's settlement offer would not have been enforceable in either state or federal court, and as such, R.R. had an interest in continuing litigation to obtain a judicial order that could be enforced against EPISD. The district court then held that R.R. had prevailed in the litigation by obtaining a judicial order entitling him to all of his requested relief. Because the district court determined that R.R.'s litigation was not frivolous, the court also dismissed EPISD's attorney's fee claim.

Following this prevailing party determination, R.R. moved for attorney's fees. In response, EPISD again argued that because R.R. had achieved nothing more than was originally offered, the district court should not award attorney's fees to R.R. The district court disregarded EPISD's contentions, stating that it had considered those arguments in making its prevailing party determination. Instead, the district court granted R.R.'s motion for attorney's fees in August 2008 and awarded $45,804 in fees to R.R.—an award that reflected the full amount of work R.R.'s attorney had done. EPISD now appeals the district court's prevailing party and attorney's fee decisions.

II. DISCUSSION

The IDEA requires that a party be a "prevailing party" in order to be entitled to attorney's fees. *See* 20 U.S.C. § 1415(i)(3)(B)(i) ("[T]he court, in its discretion, may award reasonable attorneys' fees . . . to a prevailing party . . . ."). Thus, in an action for attorney's fees under the IDEA, the threshold question

is whether the party seeking attorney's fees is the prevailing party. *See Jason D.W. ex rel. Douglas W. v. Houston Indep. Sch. Dist.*, 158 F.3d 205, 209 (5th Cir. 1998) (per curiam). However, "[a] finding that a party is a prevailing party only makes him eligible to receive attorneys' fees under the IDEA; it does not automatically entitle him to recover the full amount that he spent on legal representation." *Id.*

A. Prevailing Party Status

Under the IDEA, "a prevailing party is one that attains a remedy that both (1) alters the legal relationship between the school district and the handicapped child and (2) fosters the purposes of the IDEA." *Jason D.W.*, 158 F.3d at 209. This test follows from *Texas State Teachers Association v. Garland Independent School District*, where the Court held that the "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." 489 U.S. 782, 792–93 (1989); *see also Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("[P]laintiffs may be considered 'prevailing parties' . . . if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.").

More recently, in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, the Supreme Court clarified that a prevailing party is one that has obtained a judgment on the merits, a consent decree, or some similar form of judicially sanctioned relief. 532 U.S. 598, 603–04 (2001). We now join our sister circuits in applying

Buckhannon in the IDEA context[3] and hold that a litigant must attain some judicial imprimatur on a material alteration of the legal relationship in order to be a prevailing party.[4] We have already joined our

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[3] *See, e.g.*, *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 478–79 (7th Cir. 2003) ("[T]o be a prevailing party [post-*Buckhannon*,] a litigant must have obtained a judgment on the merits, a consent decree, or some similar form of judicially sanctioned relief . . . on any significant issue in litigation which achieves some of the benefits the parties sought in bringing suit." (internal quotation marks omitted)); *see also J.D. ex rel. Davis v. Kanawha County Bd. of Educ.*, 571 F.3d 381, 386–87 (4th Cir. 2009) ("As the Supreme Court noted in *Buckhannon*, an award of attorneys' fees requires a material alteration of the legal relationship of the parties. . . ,[but] a party need not prevail on every issue . . . . [O]btaining judicially sanctioned and enforceable final relief on some claims is sufficient." (internal quotation marks omitted)); *Doe v. Boston Pub. Sch.*, 358 F.3d 20, 29–30 (1st Cir. 2004) ("Consistent with each of the circuit courts that have considered the application of *Buckhannon* to the IDEA, we hold that IDEA plaintiffs who achieve their desired result via private settlement may not, in the absence of judicial imprimatur, be considered 'prevailing parties.'"); *John T. ex rel. Paul T. v. Del. County Intermediate Unit*, 318 F.3d 545, 556 (3rd Cir. 2003) ("The [*Buckhannon*] Court acknowledged that a party benefitting from a settlement agreement, for example, could be a prevailing party, provided the change in the legal relationship of the parties was in some way *judicially sanctioned*." (internal quotation marks omitted)).

[4] An administrative hearing officer's order provides the requisite "judicial imprimatur" for a party to be considered a "prevailing party" for attorney's fee purposes, despite the fact that the administrative hearing officer does not have the authority to award attorney's fees. The IDEA provides that a court may award attorney's fees to any party that prevails in an "action or proceeding," 20 U.S.C. § 1415(i)(3)(B)(i), and the statute implies that administrative hearings are "proceedings." *See, e.g.*, *id.* § 1415(d)(2)(F) ("due process proceedings"); *id.* § 1415(i)(2)(C)(i)

sister circuits in holding that, after *Buckhannon*, whether a party is a prevailing party "is a legal question subject to *de novo* review." *Bailey v. Mississippi*, 407 F.3d 684, 687 (5th Cir. 2005) (collecting cases).

EPISD argues that R.R. is not the prevailing party. EPISD contends that because it offered R.R. all requested relief before litigation, R.R.'s attainment of relief did not alter the legal relationship between the

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("administrative proceedings"); *id.* § 1415(i)(3)(D)(i)(I) ("administrative proceeding"). Our sister circuits have also recognized that attorney's fees can be awarded to a party who prevails at an administrative hearing. *See, e.g.*, *A.R. ex rel. R.V. v. N.Y. City Dep't of Educ.*, 407 F.3d 65, 76 (2d Cir. 2005) ("In order to give effect to the IDEA's intent to permit awards to winning parties in administrative proceedings even where there has been no judicial involvement, as the parties agree that we must, we conclude that the combination of administrative *imprimatur*, the change in the legal relationship of the parties arising from it, and subsequent judicial enforceability, render such a winning party a 'prevailing party' under *Buckhannon*'s principles."); *T.D. v. LaGrange*, 349 F.3d at 479 ("[W]e held in *Brown v. Griggsville Comm. Unit Sch. Dist. No. 4*, that the IDEA does allow fees to the prevailing party in administrative hearings. 12 F.3d 681, 683–84 (7th Cir. 1993). While we recognize that this opinion was issued before *Buckhannon*, we do not perceive that *Buckhannon* requires a different conclusion."). These authorities are consonant with our pre-*Buckhannon* precedent holding that success at an administrative proceeding entitles a party to attorney's fees. *See Duane M. v. Orleans Parish Sch. Bd.*, 861 F.2d 115, 120 (5th Cir. 1988) ("The legislative history of section 1415[] reflects Congress' unequivocal intent to award attorneys' fees to parents for legal representation at due process hearings which the [IDEA] requires. To hold that prevailing parties in these hearings cannot bring a separate suit for attorneys' fees would defeat that intent . . . .").

parties and did not foster the purposes of the IDEA.[5] In response, R.R. points to the fact that both the hearing officer and the district court determined that R.R. was entitled to a full evaluation, thereby altering (as the district court held) the legal relationship between R.R. and EPISD and fostering the purposes of the IDEA by enabling the provision of an appropriate public education.

As discussed above, the IDEA provides that "[i]n any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees . . . to a prevailing party." 20 U.S.C. § 1415(i)(3)(B)(i)(I). The IDEA features a plethora of provisions dealing with attorney's fees, several of which contemplate reducing the attorney's fee award of a party that ultimately prevails in an administrative or judicial proceeding. For example, a prevailing party that ultimately achieves no more than what was earlier offered in settlement may not recover attorney's fees incurred subsequent to the settlement offer. *Id.* § 1415(i)(3)(D)(i).[6] Similarly, a court may reduce the

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[5] EPISD spends over half of its brief on appeal arguing that R.R. did not present a justiciable case or controversy to either the state due process hearing officer or the district court. We respond simply by noting that EPISD itself admitted in its settlement offer to R.R. that "[t]here are genuine issues of fact and law in dispute in this matter; thus, an agreed order is not in order." (Offer of Settlement from EPISD to R.R., Oct. 11, 2006.)

[6] Section 1415(i)(3)(D)(i) provides:

> Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if—
>
> (I) the offer is made within the time prescribed by Rule

attorney's fees awarded to a prevailing party found to have unreasonably protracted the litigation. *Id.* § 1415(i)(3)(F)(i).[7] Particularly at issue here is § 1415(i)(3)(D)(i), which provides that "[a]ttorneys' fees may not be awarded . . . in any action . . . for services performed *subsequent to the time of a written offer of*

> 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;
> (II) the offer is not accepted within 10 days; and
> (III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

Id. § 1415(i)(3)(D)(i).

[7] Section 1415(i)(3)(F) contemplates that an attorney's fee award will be reduced under several enumerated circumstances:

> Except as provided in subparagraph (G), whenever the court finds that—
>
> (i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;
> (ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;
> (iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or
> (iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint described in subsection (b)(7)(A),
>
> the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

Id. § 1415(i)(3)(F).

settlement . . . [if] the court . . . finds that the relief finally obtained . . . is not more favorable . . . than the offer of settlement." *Id.* § 1415(i)(3)(D)(i) (emphasis added). In imposing this bar against recovering attorney's fees incurred subsequent to the offer of settlement, that provision tacitly assumes that a party may reject such an offer and nevertheless attain prevailing party status: the statute permits an award of attorney's fees for work performed *prior* to the written offer of settlement, and prevailing party status is a predicate for any such award. *See id.* § 1415(i)(3)(B)(i).

Several of our sister circuits have addressed provisions of the IDEA that contemplate reducing attorney's fee awards for those parties who reject settlement offers and later obtain no more than what was offered. In so doing, these circuits have recognized that such a party still "prevails" by obtaining judicially sanctioned relief, notwithstanding the reduced attorney's fee award. In *T.D. v. LaGrange,* the Seventh Circuit addressed T.D.'s argument that the IDEA, by virtue of its complex array of provisions dealing with attorney's fees, fell beyond the scope of *Buckhannon* and that private IDEA settlements could therefore convey prevailing party status. 349 F.3d at 476. In rejecting that argument, the Seventh Circuit discussed generally the provisions of the IDEA that deal with settlement offers and reduction of fees. In this discussion, the Seventh Circuit noted that "if a plaintiff rejects a settlement offer and eventually receives a judicially sanctioned victory that is less beneficial than the settlement offer was, the plaintiff, though being a 'prevailing party,' may not get the fees incurred after the settlement offer." *Id.* at 476 (citing 20 U.S.C. § 1415(i)(3)(D)(i)). Similarly, the D.C.

Circuit and the Third Circuit, in addressing whether *Buckhannon* applies to the IDEA, recognized that the IDEA contemplates reducing fees when a litigant rejects a settlement offer and does not achieve more favorable relief that what was offered, but that the litigant remains the prevailing party. *See, e.g.*, *Alegria ex rel. Alegria v. District of Columbia*, 391 F.3d 262, 267 (D.C. Cir. 2004) ("A parent who refuses a written offer to settle a complaint, and later prevails at an administrative hearing or in court but obtains a result that is not more favorable than the written settlement offer, would still be eligible for an award of attorneys' fees for work performed prior to the settlement offer . . . ."); *John T.*, 318 F.3d at 557 ("[Section 1415(i)(3)(D)–(G)] define situations in which attorney's fees [awarded to a prevailing party] may be prohibited or reduced, *e.g.*, when a parent has unjustifiably rejected a settlement offer or when a parent has unreasonably protracted the final resolution.").[8]

However, we have held that parties that extend litigation may be denied prevailing party status. In *Michael T. ex rel. Oralee T. v. El Paso Independent*

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[8] *See also Dell v. Bd. of Educ.*, 918 F. Supp. 212, 217 (N.D. Ill. 1995) ("[T]his court concludes that the relief finally obtained by Plaintiffs was not, in fact, more favorable than Defendant's offer, in spite of the fact that both hearing officers' decisions are replete with findings that Defendant violated Plaintiffs' son's rights. . . . Thus, although Plaintiffs are 'prevailing parties' for purposes of a fee award . . . the *relief* they won consists only of reimbursement of $2,000.00 for the reasonable and customary expense of an independent evaluation of their son's needs. Because that sum is not more favorable than the $3,000.00 payment offered by Defendant School District before the administrative hearing, [Plaintiffs] are barred from recovery of fees for services rendered at that hearing or in these proceedings.").

School District, 37 F. App'x 714, 2002 WL 1221847, at *1 (5th Cir. 2002) (per curiam), an unpublished opinion which is not precedential, *see* 5TH CIR. R. 47.5, but is nevertheless persuasive, we held that a district court did not clearly err (the test in this circuit pre-*Buckhannon*) in determining that Michael was not the prevailing party because Michael unreasonably withheld consent for an evaluation. *Id.* The facts in *Michael T.* were substantially similar to the present matter—EPISD and the attorney for R.R., Mark Berry, were both involved, and the end result was that Michael also achieved an order entitling him to a full evaluation at the due process hearing—but there the district court found that Michael was not the prevailing party because the results Michael achieved through litigation "could have been obtained at any time from the [school] district but for his mother's refusal to give consent to the initial assessment." *Id.* We affirmed, stating that "we cannot say that the district court clearly erred in determining that the purposes of the IDEA are not fostered by encouraging parents of potentially disabled children to withhold consent to an initial assessment in order to obtain prevailing party status." *Id.*

We need not resolve the issue today whether a party who rejects a settlement offer and obtains from an administrative hearing officer or the district court no more educational benefit than the settlement offered is technically a "prevailing party." Instead, we assume, without deciding, that R.R. is a prevailing party simply because he achieved a judicial order of relief, and we consider only whether R.R.'s rejection of EPISD's settlement offer should affect the amount of R.R.'s attorney's fees award. In so doing, we leave for another day the question whether denying prevailing

party status in these circumstances might also be appropriate under the IDEA.

B. Attorney's fees

In considering the parties' attorney's fees arguments, we examine (1) the award of fees to R.R. for work performed after EPISD's written settlement offer; (2) the award of fees to R.R. for work performed prior to EPISD's written settlement offer; and (3) EPISD's claim for attorney's fees.

1. R.R.'s Attorney's Fees Post-Settlement Offer

The first question is whether the district court abused its discretion[9] in awarding attorney's fees to R.R. for work performed after EPISD's written settlement offer—formalizing the offer made at the resolution meeting—which was made the day of the resolution meeting and more than ten days before the administrative proceeding. That question is answered by several provisions of the IDEA.

The IDEA envisions that the parties to a dispute should resolve their differences cooperatively. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005) ("The core of the [IDEA] is the cooperative process that it establishes between parents and schools."). To effectuate this goal, the statute requires that "[p]rior to the opportunity for an impartial due process hearing . . . the local education agency shall convene a meeting

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[9] We review an award of attorney's fees for abuse of discretion, and we review the factual findings upon which the award is based for clear error. *Jason D.W.*, 158 F.3d at 208.

with the parents and the relevant . . . members of the [educational program t]eam . . . ." 20 U.S.C. § 1415(f)(1)(B)(i). The statute further contemplates resolution without resort to litigation by endorsing settlement agreements: "In the case that a resolution is reached to resolve the complaint at [the resolution] meeting described in [20 U.S.C. § 1415(f)(1)(B)](i), the parties shall execute a legally binding agreement that is . . . enforceable in any State court of competent jurisdiction or in a district court of the United States." *Id.* § 1415(f)(1)(B)(iii)(II).

Early resolution through settlement is favored under the IDEA. The statute bars an award of attorney's fees for work performed subsequent to a written settlement offer that does not achieve anything more than that which was offered. *See supra* Section II(A) (discussing 20 U.S.C. § 1415(i)(3)(D)(i)). Notwithstanding that bar, a court may award attorney's fees to a "parent who is the prevailing party and who was substantially justified in rejecting the settlement offer." *Id.* § 1415(i)(3)(E).

i. Settlement Enforceability

Because it is undisputed that R.R. did not achieve any educational benefits beyond what EPISD offered, the question is whether R.R. was substantially justified in rejecting EPISD's settlement offer. The district court held that EPISD's settlement offer would not have been enforceable if it had been reduced to an agreement. Specifically, the district court determined that a private settlement would have lacked the judicial imprimatur required to be enforceable in federal court. Further, the district court determined that Texas had not waived its immunity from suit in

state court for the type of settlement offered by EPISD, and accordingly, EPISD's settlement offer would not have been enforceable in state court. The district court, after determining that R.R. would not have been able to enforce the settlement in either federal or state court, concluded that R.R. had an interest in continuing litigation to obtain an "enforceable" order of relief, and declined to reduce R.R.'s attorney's fee award. With respect, we disagree.

The IDEA states that "district courts of the United States shall have jurisdiction of actions brought under this section [20 U.S.C. § 1415] without regard to the amount in controversy." *Id.* § 1415(i)(3)(A); *see also* 34 C.F.R. § 300.516(d). The statute further contemplates that, if the parties are able to resolve their dispute at the resolution meeting, they should "execute a legally binding agreement that is . . . enforceable in any State court of competent jurisdiction or in a district court of the United States." 20 U.S.C. § 1415(f)(1)(B)(iii)(II); *see also* 34 C.F.R. § 300.510(d). Pretermitting any discussion of whether R.R. could have enforced a settlement agreement against EPISD in state court, we determine that a settlement agreement reached at the resolution meeting would have been enforceable in federal court.

Courts have recognized that federal courts can enforce IDEA settlement agreements reached at a resolution meeting. In *H.C. ex rel. L.C. v. Colton-Pierrepont Central School District*, the Second Circuit considered whether an agreement between the parties reached outside a resolution meeting or mediation was enforceable in federal court. No. 08-4221-CV, 2009 WL 2144016, at * 2 (2d Cir. July 20, 2009) (summary order). There, H.C. filed a due process complaint

seeking greater educational services in November 2005. *H.C. ex rel. L.C. v. Colton-Pierrepont Cent. Sch. Dist.*, 567 F. Supp. 2d 340, 342 (N.D.N.Y. 2008). The parties then met at the required resolution meeting later that November, but they were unable to reach an agreement. *Id.* However, in May 2006, before any administrative hearing had occurred, the parties entered into a written settlement agreement that resolved their dispute. *Id.*

In June 2006, the school district created a new educational plan for H.C. that reduced the level of services provided to H.C., and, in response, H.C. again made a due process request, seeking more services and enforcement of the May 16 settlement agreement. *Id.* At the due process hearing, the hearing officer, despite considering the substance of H.C.'s educational claims, declined to exercise jurisdiction over the May 2006 settlement agreement, and the state review officer concurred on appeal. *Id.* As a party aggrieved by the decisions of the hearing officer and the state review officer, H.C. filed suit in federal district court. The district court concluded, among other things, that the hearing officer erred in determining that he had no authority to enforce the settlement agreement, and the court accordingly remanded to the hearing officer for a new hearing. *Id.* at 344. The school district then appealed the district court's order to the Second Circuit.

On appeal, the Second Circuit vacated the district court's remand order. *H.C.*, 2009 WL 2144016, at * 3. In its opinion, the Second Circuit considered "[w]hether the district court had federal question jurisdiction to enforce the [May 2006] settlement agreement." *Id.* at *2. The court stated that "[while

c]ontract enforcement is generally a question of state law[,] . . . *Congress has expressly provided for enforcement of IDEA settlement agreements in federal district courts when the agreement at issue was entered into . . . at a 'resolution session' required by § 1415(f)(1)(B).*" *Id.* (emphasis added). However, because the May 2006 settlement agreement was not entered into either at the resolution meeting or through mediation, the Second Circuit remanded the case to the district court to determine whether "there [wa]s a jurisdictional basis for considering plaintiff's contract claim." *Id.*

District courts across the country have also recognized that IDEA settlement agreements reached at a resolution meeting are enforceable in federal court. *See, e.g., J.M.C. v. La. Bd. of Elementary & Secondary Educ.*, 584 F. Supp. 2d 894, 898 (M.D. La. 2008) (stating that an agreement reached at a resolution meeting would have been enforceable in federal court); *L.K. ex rel. L.K. v. Burlingame Sch. Dist.*, No. C 08-02743, 2008 WL 2563155, at *4 n.8 (N.D. Cal. June 23, 2008) ("The Court also notes that . . . the [IDEA] permits settlement agreements reached . . . through a resolution session under 1415(f) to be enforceable in federal courts . . . ."); *Traverse Bay Area Intermediate Sch. Dist. v. Mich. Dep't of Educ.*, No. 5:06-CV-139, 2007 WL 2219352, at *7 (W.D. Mich. July 27, 2007) ("[W]ritten settlement agreements reached during the mediation process or in a resolution session which comply with the [IDEA] requirements are now enforceable in state and federal courts."); *Bowman v. District of Columbia*, No. 05-01933, 2006 WL 2221703, at *2 (D.D.C. Aug. 2, 2006) (recognizing that a district court has jurisdiction to enforce a settlement

agreement reached either at the resolution meeting or during mediation).[10]

Here, EPISD offered R.R. all of his requested educational relief at the resolution meeting. We conclude that if R.R. had accepted EPISD's offer, he could have enforced the resulting settlement agreement in federal court.[11] As such, there was no need for R.R. to reject EPISD's settlement offer and continue litigation solely to obtain an "enforceable" order of relief.

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[10] Several commentators also recognize that IDEA settlement agreements reached at a resolution meeting are enforceable in federal court. *See, e.g.*, Andrea F. Blau, *Available Dispute Resolution Processes within the Reauthorized Individuals with Disabilities Education Improvement Act (IDEIA) of 2004: Where Do Mediation Principles Fit In?*, 7 PEPP. DISP. RESOL. L.J. 65, 72 (2007) ("Decisions reached between the parties [at a resolution meeting] are binding and enforceable."); Allan G. Osborne & Charles J. Russo, *Resolution Sessions Under the IDEA: Are They Mandatory?*, 218 WEST EDUC. L. REP.7, 9 (2007) ("A settlement agreement [reached at a resolution meeting] is enforceable by a state or federal court . . . ."); Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 31 (2006) ("If the parent and school district reach an agreement in the resolution session, the parties execute a legally binding document, which may be enforced directly in court . . . .").

[11] If R.R. had accepted EPISD's written settlement offer, made the day of the resolution meeting, then the parties would have entered into the "legally binding agreement" contemplated by 20 U.S.C. § 1415(f)(1)(B)(iii). Accordingly, we do not have occasion to decide today whether a district court would have jurisdiction to enforce a settlement agreement entered into outside a resolution meeting.

ii. Substantially Justified Settlement Rejection

Given that R.R. did not need to continue litigation to obtain an enforceable agreement covering all requested relief, we conclude that R.R. was not "substantially justified" in rejecting EPISD's settlement offer. *See* 20 U.S.C. § 1415(i)(3)(E). Further, R.R.'s own filings indicate that he recognized that a settlement agreement made at the resolution meeting was enforceable.[12]

Because R.R. was not substantially justified in rejecting EPISD's settlement offer, § 1415(i)(3)(D) applies and prohibits an attorney's fee award for work performed subsequent to the time of EPISD's written settlement offer. *See Shelly C. ex rel. Shelbie C. v. Venus Indep. Sch. Dist.*, 878 F.2d 862, 864 (5th Cir. 1989) (recognizing that the IDEA bars an award of attorney's fees for work performed subsequent to a settlement offer of all requested relief); *Duane M.*, 861 F.2d at 119 (same). Accordingly, the district court abused its discretion by awarding attorney's fees to R.R. for work performed subsequent to EPISD's written settlement offer.

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[12] (*See, e.g.*, R.R.'s Mem. in Supp. of Mot. to Dismiss ¶ 18, May 22, 2007 ("[S]ettlements with a school district (*except those that result from a resolution meeting . . .*) are not enforceable . . . ." (emphasis added)); R.R.'s Reply to EPISD's Opp'n to Mot. for Summ. J. 2, Dec. 14, 2007 ("Likewise, any written settlement agreement that is 'reached to resolve the complaint at a [resolution meeting]' . . . is enforceable in a state or federal court.").)

2. R.R.'s Attorney's Fees for Pre-Settlement Offer Work

The next question is whether the district court abused its discretion in awarding R.R. attorney's fees for work performed during and prior to the resolution meeting. We determine that the district court abused its discretion because R.R. was not entitled to an award of attorney's fees for such work.

i. Fees for Participating in the Resolution Meeting

The IDEA allows an attorney's fee award for work performed in any "action or proceeding." 20 U.S.C. § 1415(i)(3)(B)(i). However, the IDEA specifically excludes resolution meetings from the scope of that definition. *Id.* § 1415(i)(3)(D)(iii) ("A [resolution meeting] shall not be considered . . . a meeting convened as a result of an administrative hearing or judicial action; or . . . an administrative hearing or judicial action."); *see also* 34 C.F.R. § 300.517(c)(2)(iii). Accordingly, R.R. cannot be awarded attorney's fees for work performed at the resolution meeting, and the district court below abused its discretion in awarding fees for work performed at that meeting. *See, e.g., D.D. ex rel. Davis v. District of Columbia*, 470 F. Supp. 2d 1, 2 (D.D.C. 2007) ("It is undisputed that attorneys' fees for time actually spent at a resolution session . . . generally are not compensable under the [IDEA]."); *J.Y. ex rel. Thomas v. Seattle Sch. Dist. No. 1*, No. C07-1226, 2007 WL 4111202, at * 7 (W.D. Wash. Nov. 16, 2007) ("Plaintiff[s] may not be awarded fees associated with participating in resolution sessions.").

ii. Fees for Work Performed Prior to the Resolution Meeting

Finally, we review whether R.R. is entitled to attorney's fees for work his attorney performed prior to the resolution meeting. The IDEA states that a court shall reduce fees "whenever the court finds that . . . the parent, or the parent's attorney . . . unreasonably protracted the final resolution of the controversy." 20 U.S.C. § 1415(i)(3)(F)(i).[13] As such, we must determine whether R.R.'s rejection of EPISD's settlement offer unreasonably protracted the final resolution of the controversy such that a further reduction in the fee award is warranted.[14]

As discussed above, when a party rejects an offer of settlement and later achieves at an administrative or judicial proceeding no more than what was previously offered, a court may, but is not required to, award reasonable attorney's fees for work performed *prior* to the written offer of settlement under § 1415(i)(3)(D)(i). On the other hand, if a party accepts an offer of settlement, that party may not be the prevailing party

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[13] As a threshold matter, the IDEA states that § 1415(i)(3)(F) shall not apply "if the court finds that the . . . local educational agency unreasonably protracted the final resolution of the action or proceeding . . . ." *Id.* § 1415(i)(3)(G). Nothing in the record indicates that EPISD unreasonably protracted resolution of this dispute.

[14] In considering this question, we note that extended litigation under the IDEA is disfavored because it imposes heavy costs on the litigants and delays implementation of an appropriate educational plan for children with disabilities. *See Schaffer*, 546 U.S. at 58–59 (discussing the costs of litigating IDEA disputes and Congress's intent to reduce IDEA litigation).

and thus not be entitled to an award of attorney's fees.[15]

We need not speculate about these alternate situations. Here, EPISD wisely included the payment of reasonable attorney's fees to R.R as part of its settlement offer. Consequently, R.R. was offered all requested educational relief *and* reasonable attorney's fees, leaving absolutely no need to continue litigating. Instead, R.R. and his attorney rejected EPISD's settlement, walked out of the resolution meeting, continued litigation, and unreasonably protracted the resolution of this dispute for over three years. *See Jason D.W.*, 158 F.3d at 211 ("[F]ailing to settle can constitute protraction under [the IDEA]."); *Shelly C.*, 878 F.2d at 863 (reversing summary judgment in part because the district court did not consider whether the parent's attorney unreasonably protracted resolution of the dispute when the parties ultimately settled). Accordingly, we conclude that the district court here abused its discretion in awarding attorney's fees to R.R. for work performed prior to EPISD's written settlement offer of all requested relief *and* reasonable attorney's fees. "[T]he IDEA only guarantees the right to a free education; it does not explicitly guarantee the right to attorney's fees incurred in pursuit of that education." *T.D. v. LaGrange*, 349 F.3d at 477.

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[15] *See, e.g.*, *Doe v. Boston*, 358 F.3d at 29–30 (" Consistent with each of the circuit courts that have considered the application of *Buckhannon* to the IDEA, we hold that IDEA plaintiffs who achieve their desired result via private settlement may not, in the absence of judicial imprimatur, be considered 'prevailing parties.'"); *T.D. v. LaGrange*, 349 F.3d at 476–78 (recognizing that a private settlement without judicial imprimatur is insufficient to convey prevailing party status); *John T.*, 318 F.3d at 557 (same).

3. EPISD's Claim For Attorney's Fees

EPISD also requests that we reverse the district court's dismissal of its suit for attorney's fees. The IDEA provides that a court "may award reasonable attorneys' fees . . . to a *prevailing party* who is a . . . local educational agency against the attorney of a parent who files a complaint . . . that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation." 20 U.S.C. § 1415(i)(3)(B)(i)(II) (emphasis added). A court may also "award reasonable attorneys' fees . . . to a *prevailing* State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose . . . ." *Id.* § 1415(i)(3)(B)(i)(III) (emphasis added); *see also* Weber, *supra* note 10, at 29 (discussing these provisions). As such, prevailing party status is a predicate for an award of attorney's fees to EPISD.[16]

Here, there is no indication that EPISD did prevail or would have prevailed on R.R.'s underlying request for educational relief. Indeed, EPISD's whole argument rests on the fact that it offered to provide R.R. all of his requested educational relief. Thus, even though EPISD has "prevailed" by successfully arguing

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[16] *See, e.g.*, *District of Columbia v. Ijeabuonwu*, 631 F. Supp. 2d 101, 104 (D.D.C. 2009) (recognizing that a school district must be a prevailing party in order to be entitled to attorney's fees under the IDEA); *Parenteau v. Prescott Unified Sch. Dist.*, No. CV-07-8072, 2009 WL 2169154, at *7 (D. Ariz. July 17, 2009) (same).

for a reduction in R.R.'s fee award, EPISD has not prevailed in arguing that R.R. is not entitled to his requested educational relief. Thus, we cannot say that EPISD was the "prevailing party" such that it is entitled to attorney's fees under the IDEA. Accordingly, we affirm the district court's dismissal of EPISD's claim for attorney's fees.

III. CONCLUSION

For the foregoing reasons, we vacate the award of attorney's fees to R.R. We affirm the dismissal of EPISD's claim for attorney's fees.

AFFIRMED in part; VACATED in part. Costs shall be borne by Mark Berry.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-50830

D.C. Docket No. 3:07-CV-125
D.C. Docket No. 3:07-CV-126

[Filed December 16, 2009]

EL PASO INDEPENDENT SCHOOL DISTRICT

Plaintiff - Appellant

v.

RICHARD R, as next friend of RR; MARK BERRY

Defendants - Appellees

RR, by his next friend ER

Plaintiff-Appellee

v.

EL PASO INDEPENDENT SCHOOL DISTRICT

Defendant - Appellant

Appeal from the United States District Court
for the Western District of Texas, El Paso

Before KING, DAVIS, and BENAVIDES, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed in part and vacated in part in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that costs on appeal shall be borne by Mark Berry.

ISSUED AS MANDATE:

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By: _____
Deputy

New Orleans, Louisiana

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

EP-07-CV-00125-KC
(Consolidated Action)

[Filed August 22, 2008]

EL PASO INDEPENDENT SCHOOL DISTRICT,

Plaintiff,

v.

RICHARD R., as next friend of R.R., et al.,

Defendants.

R.R., by his next friend of E.R.,

Plaintiffs,

EL PASO INDEPENDENT SCHOOL DISTRICT,

Defendant.

ORDER

On this day, the Court considered Richard R.'s ("RR's") "Motion for Attorney Fees and Memorandum of Law" ("Motion"). For the reasons set forth herein, Plaintiff's Motion is **GRANTED** in part and **DENIED** in part.

I. BACKGROUND

Because the Court has exhaustively explored the background of this case in a previous Order, the Court need not do so now. *See El Paso Indep. Sch. Dist. v. Richard R. ex rel. R.R.*, No. EP-07-CV-00125-KC, 2008 WL 2908828, at *1-2 (W.D. Tex. Jul. 14, 2008). For purposes of the instant Order, the Court need only emphasize its previous holding that "RR successfully prosecuted his case before the [Special Education Hearing Officer ("SEHO")] . . . thereby altering the legal relationship between RR and [El Paso Independent School District ("EPISD")] in such a manner as to confer prevailing party status upon RR." *Id.* at *27.

II. DISCUSSION

A. Standard

In an action or proceeding brought pursuant to the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. §§ 1400-1491, the court may award reasonable attorneys' fees to the parents or guardian of a child with a disability as long as that child is a prevailing party. *Jason D.W. ex. rel. Douglas v. Houston Ind. Sch. Dist.*, 158 F.3d 205, 208 (5th Cir. 1998) (citing 20 U.S.C. § 1415(e)(4)(B) (2006)). For

purposes of attorneys' fees, a prevailing party is generally one who succeeds on any significant issue that achieves some benefit for the plaintiff. *Id.* at 209. In the context of the IDEA specifically, the Fifth Circuit has held that a prevailing party is one that attains a remedy that both (1) alters the legal relationship between the school district and the child and (2) fosters the purposes of the IDEA. *Id.*

The calculation of reasonable attorneys' fees involves a two-step process. *Id.* at 208-09. First, the court multiplies the reasonable number of hours expended on the case by a reasonable hourly rate to come up with a "lodestar" fee. *Id.* at 209. Next, the court considers whether the lodestar should be adjusted by reference to the following twelve factors:

(1) the time and labor required for the litigation;
(2) the novelty and difficulty of the questions presented;
(3) the skill required to perform the legal services properly;
(4) the preclusion of other employment by the attorney due to acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client or the circumstances;
(8) the amount involved and the result obtained;
(9) the experience, reputation, and ability of the attorneys;
(10) the "undesirability" of the case;
(11) the nature and length of the professional relationship with the client; and
(12) awards in similar cases.

Id. (citing *Johnson v. Georgia Highway Express, Inc.* 488 F.2d 714, 717-19 (5th Cir. 1974)).

Many of these factors are often subsumed within the initial lodestar calculation. *Id.* For those that are not subsumed, the court may weigh some factors more heavily than others in adjusting the lodestar. *Id.* For example, the United States Supreme Court has held that the most critical factor in determining the reasonableness of a fee award is the degree of success obtained in the case, especially when a plaintiff has prevailed on only a portion of his claims. *Id.* (citing *Farrar v. Hobby*, 506 U.S. 103, 114 (1992)).

B. RR's Claim for Attorney Fees

RR argues that he is entitled to $19,082.00 for the preparation and trial of the administrative hearing and $29,845.00 for the preparation and trial of the attorneys' fees matter before this Court, for a total award of $48,927.00. RR.'s Mot. 2; RR's Decl. in Supp. of Att'y Fees ("RR's Decl."), App. A at 3, 7. RR first argues that he is entitled to a reasonable hourly rate of $235.00 per hour, based upon the affidavits of Francisco Dominguez ("Dominguez") and John Wenke ("Wenke"), two local attorneys specializing in employment litigation. RR.'s Mot. 2; Decl. in Support of Att'y Fees of Francisco Dominguez ¶ 5, Decl. in Support of Att'y Fees of John Wenke ¶ 6. Dominguez declares that the reasonable hourly rate for an El Paso attorney is between $220.00 and $260.00 per hour, while Wenke declares that a reasonable hourly rate for an El Paso attorney is between $200.00 and $350.00 per hour. Decl. in Support of Att'y Fees of Francisco Dominguez ¶ 5; Decl. in Support of Att'y Fees of John Wenke ¶ 6. Notably, Wenke explains that RR's

attorney "has over 37 years of experience as an attorney with certification in civil trial law and special competence in education law." Decl. in Support of Att'y Fees of John Wenke ¶ 5. Thus, RR's attorney's experience exceeds that of Dominguez and Wenke combined.

RR next argues that his attorney should receive this hourly rate for 81.2 hours spent in the underlying administrative matter, and for 127 hours spent in responding to EPISD's appeal of the SEHO's decision and pursuing attorneys fees in federal court. RR's Decl. App. A at 3, 7. Finally, RR argues that his attorney obtained "highly successful" results,[1] despite the fact that this "was an 'undesirable' case" for an attorney. RR's Decl.¶ 7. According to RR's attorney, this was the only time "in [his] career anyone has claimed that [he] brought a frivolous action or brought an action to harass." *Id.*

C. EPISD's Objections

EPISD devotes the bulk of its Response to RR's Motion to relitigating issues already decided by the Court.[2] EPISD's Resp. to RR's Mot. ("EPISD's Resp.") 4-10. Eight days after receiving EPISD's Response, the

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[1] Pl.'s Mot. 8.

[2] This proves particularly ironic, given that EPISD allotted the majority of its pleadings during litigation to reducing or eliminating RR's attorney fees. Now, at the point where the Local Rules of the Western District of Texas call for these objections to be made, EPISD has abandoned its right to introduce these objections in favor of failed attempts to collaterally attack a settled order of this Court. *See* W.D. TEX. LOC. R. CV-7(i).

Court received notice that EPISD had appealed its Order granting summary judgment in favor of RR to the United States Court of Appeals for the Fifth Circuit. *See* Doc. No. 54. If EPISD's desire is to contest the Court's previous Order,[3] the proper place to lodge those challenges is before the Fifth Circuit.

Of the six sections that EPISD dedicates to objecting to RR's Motion, only the sixth and final section represents a competent objection. *See* EPISD's Resp. 10. Within section II(F) of its Response, EPISD properly posits that "any award of attorneys' fees under the IDEA *must* be reasonable and reflect the degree of success obtained." *Id.* (citing 20 U.S.C. § 1414(c)(4)(b); *Jason D.W.*, 158 F.3d at 210). To that end, EPISD contends that "[i]n considering the degree of success, federal courts have consistently held that a rejected settlement offer should be considered and any award adjusted accordingly." *Id.* (citations omitted). Although EPISD also infuses this section with attempts to relitigate decided issues,[4] EPISD notes that this Court "did not find that EPISD engaged in any Child Find violations for the 2006-2007 school year." *Id.* EPISD concludes by claiming that RR's "lack

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[3] At one point, EPISD even "objects and moves to strike" assertions made by RR during the course of litigation before this Court. This objection represents the most blatant example of trying to revive issues previously decided by this Court, and as such, must be **OVERRULED**. *See* EPISD's Resp. 8.

[4] EPISD claims that RR "received nothing more than what was offered before the due process hearing was even requested and held." *Id.* at 10. This statement completely ignores this Court's previous Order and must be disregarded for purposes of the present Order.

of success, when considered alongside EPISD's written settlement offers, establishes that Plaintiff's claim for $48,927.00 in attorneys' fees is not proportional, is excessive, unreasonable, and supports a complete denial of any award of attorneys' fees." *Id.*

D. Reasonable Award of Fees

On May 15, 2007, and May 1, 2006, this Court decided similar cases to the one at issue and held that a reasonable hourly rate for an attorney in this type of case is $220.00 per hour.[5] This Court therefore finds that $220.00 per hour is a reasonable hourly rate for an attorney in this type of case. Accordingly, the Court finds that an appropriate lodestar in this case is $220.00 per hour multiplied by 81.2 hours for the administrative matter, or a total of $17,864.00, and $220.00 per hour multiplied by 127 hours for the district court matter, or a total of $27,940.00. This results in an aggregate sum of $45,804.

The only *Johnson* factor which EPISD seems to question is the eighth factor: the result that RR's attorney obtained for his client. Def.'s Resp. 10; *see Johnson*, 488 F.2d at 717-19. This argument flows from EPISD's contention that RR "received nothing more" than what EPISD offered before the due process hearing, and from EPISD's observation that neither the SEHO nor this Court found that it violated its Child find obligations from 2006-2007. Def.'s Resp. 10. For these reasons, EPISD beseeches this Court not

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[5] *Patricia M. v. El Paso Indep. Sch. Dist.*, No. EP-04-CV-433-KC; *Ricardo M. v. El Paso Indep. Sch. Dist.*, EP-06-CV-439-KC.

only to reduce the lodestar, but to completely deny attorney fees to RR. *Id.*

As an initial matter, the Court finds that RR succeeded on three of the four grounds that he submitted to the SEHO, and that he achieved at least partial success as to the fourth ground. Furthermore, as to his defense against EPISD's appeal before this Court, RR achieved complete success.

Therefore, the Court declines to downwardly adjust the lodestar under the eighth *Johnson* factor. The only competent argument forwarded by EPISD concerns both the SEHO and this Court's finding that EPISD did not violate its Child Find obligation from 2006-2007. Nevertheless, both the SEHO and this Court did find that EPISD had violated its Child Find obligations in 2005. *Richard R.*, 2008 WL 2908828 at *24-26. Thus, even assuming *arguendo* that this represented a failure for RR as it relates to the Child Find claim, in the Fifth Circuit, "a party may recover for time spent on unsuccessful motions so long as it succeeds in the overall claim." *DP Solutions, Inc. v. Rollins, Inc.*, 353 F.3d 421, 434 (5th Cir. 2003). Moreover, although it is well-settled that "the extent of a plaintiff's success is a critical factor" in determining the amount of fees to be awarded in a case,[6] the Fifth Circuit has held that "claims for relief that involve a common core of facts, or derive from related legal theories, cannot be viewed as a series of discrete claims." *Hernandez v. Hill Country Tel. Coop., Inc.*, 849 F.2d 139, 144 (5th Cir. 1988). In the instant case, the Court finds that the issues in this case derive

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[6] *Hensley v. Eckerhart*, 461 U.S. 424, 440 n.14 (1983).

from a common core of facts, that RR achieved significant success as it relates to these common facts, and that no deduction under factor eight is warranted.

For the reasons set forth above, Plaintiff's counsel is entitled to $17,864.00 in pursuing the underlying administrative matter and $27,940.00 in pursuing the attorneys' fees matter, for a total of $45,804.00.

III. CONCLUSION

In light of the foregoing, RR's Motion (Doc. No. 50) is **GRANTED** in part and **DENIED** in part. EPISD is hereby **ORDERED** to remit to RR $45,804.00 in attorney fees.

SO ORDERED.

SIGNED on this 22nd day of August 2008.

/s/

KATHLEEN CARDONE
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

EP-07-CV-00125-KC
(Consolidated Action)

[Filed July 14, 2008]

EL PASO INDEPENDENT SCHOOL DISTRICT,

Plaintiff,

v.

RICHARD R., as next friend of R.R., et al.,

Defendants.

R.R., by his next friend of E.R.,

Plaintiffs,

v.

EL PASO INDEPENDENT SCHOOL DISTRICT,

Defendant.)
)

ORDER

On this day, the Court considered Plaintiff R.R.'s "Motion for Summary Judgment," ("Motion"), Defendant El Paso Independent School District's "Response to Plaintiff's Motion for Summary Judgment" ("Response"), and Plaintiff R.R.'s "Reply to E.P.I.S.D[.]'s Opposition to Summary Judgment" ("Reply"). Having reviewed these submissions, the Court is of the opinion that Plaintiff R.R.'s Motion should be **GRANTED** in its entirety.

I. BACKGROUND

The instant Motion arises from two distinct lawsuits. Initially, Defendant El Paso Independent School District ("EPISD") brought suit against Richard R., as next friend of R.R. ("RR"), and Plaintiff's attorney, Mark Berry ("Berry"), pursuant to the Individuals with Disabilities in Education Act, 20 U.S.C. § 1400, *et. seq.* ("IDEA"). Soon thereafter, RR filed his own IDEA suit, within which he named EPISD as Defendant.

The Court draws the following facts from the various pleadings submitted by both RR and EPISD. On September 26, 2006, RR, through his attorney, Berry, requested a due process hearing from the Texas Education Agency pursuant to 20 U.S.C. § 1415(b)(6).

Def. RR's Mot. to Dismiss 1-2.[1] At the time of the request, RR was a 14-year-old student attending EPISD and suffering from Attention-deficit/ hyperactivity disorder ("AD/HD"). Pl. EPISD's First Original Compl. 2. RR requested a hearing because EPISD allegedly violated the IDEA by: (1) failing to timely evaluate RR for special education services; (2) failing to provide RR with IDEA procedural safeguards; (3) failing to provide written notice of refusal to provide a special education referral; and (4) failing to comply with the "Child Find" provisions of the IDEA. Def. Berry's Mot. to Dismiss 9.

On October 11, 2006, during a resolution session, EPISD offered to: (1) conduct a full individual evaluation within sixty (60) days of the parents' consent to evaluate; (2) convene an Admission, Review, and Dismissal ("ARD") Committee meeting within thirty (30) calendar days from the completion of the evaluation; (3) continue to comply with the applicable federal and state laws regarding the provision of prior written notice to parents; (4) continue to comply with the applicable federal and state laws regarding the provision of procedural safeguards to the parents; and (5) pay attorney's fees in the amount of $3,000.00. Pl. EPISD's First Original Compl. 2-3. RR and Berry refused this offer. *Id.* Furthermore, in September 2006, EPISD set up a Student Teacher Assessment Team ("STAT") committee[2] meeting to address RR's request

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[1] Because the Motion to Dismiss pertained to cause number 07-CV-125, the pleadings related to it reverse the role of EPISD and R.R. as Plaintiff and Defendant.

[2] In the words of the Special Education Hearing Officer ("SEHO") assigned to RR's case:

for an evaluation. Administrative Record ("AR") Vol. I, 4. RR cancelled the meeting and sought instead to have the case decided by a Special Education Hearing Officer ("SEHO"). Pl. EPISD's First Original Compl. 3. On January 19, 2007, a SEHO for the State of Texas returned a decision in favor of RR on three of the four allegations. *Id.* at 4. The SEHO found that: (1) EPISD failed in its obligation to conduct a timely evaluation; (2) EPISD should have provided RR with a copy of the procedural safeguards as required by federal regulation; (3) EPISD failed to send RR the required written notification of its refusal to provide a special education referral; and (4) EPISD met its Child Find obligation. Def. Berry's Mot. to Dismiss 14.

On April 19, 2007, EPISD filed a complaint appealing the SEHO's decision and alleged that it was the prevailing party. Pl. EPISD's First Original Compl. 1. EPISD also alleged that the Court should grant EPISD attorney fees pursuant to 20 U.S.C. §§ 1415(i)(3)(B)(i)(II) and (III) because RR and Berry's suit was frivolous and brought for an improper purpose. *Id.* Conversely, on April 19, 2007, RR filed a complaint alleging that he was the prevailing party and entitled to attorney's fees. Pl. RR's Original Compl. 4.

> The STAT [c]ommittee is a pre-referral committee that reviews student information, implements interventions to meet the student's needs, and documents the success of the interventions. If the interventions are unsuccessful, the [c]ommittee should refer the student for a special education evaluation. The STAT handbook states that a "referral for evaluation for consideration of special education should be a last resort."

Administrative Record ("AR") Vol. I , 3 (citations omitted).

On May 30, 2007, this Court consolidated both actions. Doc. No. 12.[3] On July 24, 2007, this Court granted RR and Berry's Motions to Dismiss as they related to EPISD's claim of attorney fees against them. Doc. No. 22. In so doing, the Court dismissed all claims against Berry as a Defendant. *Id.*; *see* Pl. EPISD's First Original Compl. 7-8. The Court did not, however, grant RR and Berry's Motions to Dismiss as to the right of EPISD to appeal. Court Order, Sept. 24, 2007. As a result, EPISD's appeal of the SEHO's decision remains active. Pl. EPISD's First Original Compl. 1.

Following a dispute over supplementing the administrative record for purposes of proceedings before this Court,[4] RR filed his Motion for Summary Judgment. Within the Motion, RR requests that the Court "render a judgment for plaintiff for all the relief set forth in [RR's] Original Complaint."[5] Pl. RR's Mot.

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[3] Later, by the Court's Order of March 31, 2008, the Court ordered not only that the cases be consolidated, but that all filings should be placed under cause number 07-CV-125. Upon the issuance of the Order, cause number 07-CV-126 was closed. Doc. No. 48.

[4] Pursuant to the Court's Order of January 29, 2008, the submission of EPISD's additional witnesses and evidence was denied *in toto*. Doc. No. 47.

[5] As outlined in RR's Original Complaint, he seeks four types of redress from the Court. First, he seeks an injunction to "[p]rovide prior written notice to [RR's] parents whenever [EPISD] proposes to initiate or change," or when EPISD "refuses to initiate or change, the identification, evaluation, or educational placement of [RR], or the provision of a free public education to [RR] as required by 20 U.S.C. § 1415(b)(3)." Pl. RR's Original Compl. 3. He also requests that the injunction "[p]rovide [RR]'s parents notice of procedural safeguards as required by 20 U.S.C. § 1415(d)(1)(A)(I)." *Id.* at 4. Second, he requests that the Court

for Summ. J. 1. Fundamentally, RR argues that he "is entitled to summary judgment based on the administrative record on file herein and on the declaration as to attorney's fees that are submitted herewith." *Id.* at 2.

Soon after RR entered his Motion, EPISD filed its Response, wherein EPISD articulates multiple theories opposing RR's Motion.[6] Subsequent to this Response, RR also filed a Reply to these arguments.[7]

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declare him "a prevailing party" and award him reasonable attorney fees, costs, and interest. *Id.* Third, he asks the Court to grant "costs, fees, and expenses for this action." *Id.* Fourth, RR requests "such other, further, and additional relief as to the Court may seem just, proper, and appropriate." *Id.*

[6] These arguments can be summarized thus: (1) that the mootness doctrine stripped the SEHO of jurisdiction; (2) RR's failure to exhaust his administrative remedies deprived the SEHO of jurisdiction; (3) a limitations bar prevents RR's claims prior to September 26, 2005; (4) a lack of alteration in the legal relationship between the parties prevents the grant of attorney fees; (5) RR is not a prevailing party entitled to attorney fees; (6) EPISD's settlement offers preclude the award of attorney fees under IDEA; (7) RR's needless protraction of the litigation justifies denial of attorney fees altogether; (8) RR's request for attorney fees is excessive, unreasonable, and fails to consider his attorney's lack of success; and finally, (9) that RR's request for an injunction should be denied for insufficient proffer of evidence. *See* Def. EPISD's Resp. 6-25.

[7] In his Reply, RR argues the following: (1) that EPISD does not contest the reasonableness of RR's proposed attorney fees; (2) EPISD's proposed settlement was not enforceable; (3) the relief obtained by RR is indeed more favorable than the offer of settlement; and (4) RR's case is not mooted by EPISD's settlement offer. Pl. RR's Reply 1-4.

The Court will now address the various argument of the parties in turn.

II. DISCUSSION

A. Standard

This case arises under the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400, *et. seq.* Congress enacted the IDEA "to ensure that all children with disabilities have available to them a free appropriate public education ["FAPE"] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A) (2006). To achieve this aim, the IDEA compels those states receiving federal funding to educate children with disabilities "to the maximum extent appropriate . . . . with children who are not disabled,"[8] and to do so "in the least restrictive environment consistent with their needs." *Teague Indep. Sch. Dist. Todd L.*, 999 F.2d 127, 128 (5th Cir. 1993) (citing *Sherri A.D. v. Kirby*, 975 F.2d 193, 207 n.23 (5th Cir.1992) (explaining that least restrictive environment connotes "not only freedom from restraint, but the freedom of the child to associate with his or her family and able-bodied peers")). Although the FAPE that the IDEA demands of the states "need not be the best possible one, nor one that will maximize the child's educational potential," it must "be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him 'to benefit' from the instruction."

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[8] 20 U.S.C. § 1412(a)(5).

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 247 (5th Cir.1997) (quoting *Bd. of Educ. of the Hendrick Hudson Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 188-89 (1982)).

Because the State of Texas receives federal education funding, all school districts within its borders must comply with the IDEA. *See Michael F.*, 118 F.3d at 247. To meet these strictures, the various school districts must provide each disabled student on their rolls with a FAPE. *Id.* The FAPE provided must be tailored to each disabled child's needs through an "individual educational program" ("IEP"), which is a written statement prepared at a meeting attended by a "qualified" and "knowledgeable" school district representative, a teacher, the child's parents or guardians, and, when appropriate, the child himself. *See* 20 U.S.C. § 1414(d)(1)(B). In Texas, the committee responsible for preparing an IEP is known as an Admissions, Review, and Dismissal Committee ("ARD Committee"). 19 TEX. ADMIN. CODE § 89.1050; *see Michael F.*, 118 F.3d at 247.

The IDEA further provides a "comprehensive system of procedural safeguards" designed to promote compliance with its mandates. *See Honig v. Doe*, 484 U.S. 305, 308 (1988); *Rowley*, 458 U.S. at 205 (explaining the "elaborate and highly specific procedural safeguards embodied in § 1415" of the IDEA); 20 U.S.C. § 1415 (outlining a series of detailed procedural safeguards). Among these safeguards, the parents of the disabled child must be provided with "[a]n opportunity to present a complaint . . . . with respect to any matter relating to the identification, evaluation, or educational placement of the child, or

the provision of a [FAPE] to such child." 20 U.S.C. § 1415(b)(6). The IDEA also provides as follows:

> Whenever a complaint has been received under subsection (b)(6) . . . . of this section, the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

20 U.S.C. § 1415(f)(1)(A).

When a state allows for these hearings to be conducted by a local educational agency, the IDEA permits "any party aggrieved by the findings and decision rendered in such a hearing" to appeal to the state's educational agency, which must then conduct an "impartial review of such decision" and "make an independent decision upon completion of such review." 20 U.S.C. § 1415(g).

After exhausting state administrative remedies, an aggrieved party under the IDEA accrues "the right to bring a civil action . . . . in a district court of the United States, without regard to the amount in controversy." 20 U.S.C. § 1415(i)(2)(A). Moreover, a party claiming entitlement to attorney fees under the IDEA may also file a claim in district court. 20 U.S.C. § 1415(i)(3). Nevertheless, these avenues to federal court are not without limitations. Indeed, Congress has limited the role of the judiciary under the IDEA, leaving the choice of educational policies and methods in the hands of state and local school officials. *See R.H. v. Plano Indep. Sch. Dist.*, No. 4:06cv352, 2008 WL 906289, at *2 (E.D. Tex. Mar. 31, 2008) (citing *White ex. rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th

Cir.2003); *Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 91 F.3d 689, 693 (5th Cir. 1996)). The United States Supreme Court has stated as much, holding as follows:

> In assuring that the requirements of the [IDEA] have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the [IDEA] to state and local educational agencies in cooperation with the parents or guardian of the child. The [IDEA] expressly charges States with the responsibility of "acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and [of] adopting, where appropriate, promising educational practices and materials." § 1413(a)(3). In the face of such a clear statutory directive, it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to § 1415(e)(2).

Rowley, 458 U.S. at 207-08.

The Fifth Circuit has followed the Supreme Court's guidance, stating unequivocally that the judiciary's "role under the IDEA is purposefully limited." *White*, 343 F.3d at 377.

Therefore, while a federal district court's review of a SEHO's decision is "virtually *de novo*,"[9] this by no means represents an invitation to "the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Rowley*, 458 U.S. at 206. Instead, the district court should accord "due weight" to the SEHO's findings. *Adam J. ex. rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 808 (5th Cir. 2003) (quoting *Teague*, 999 F.2d at 131). Operationally, the "due weight" standard calls upon the district court to receive the record of the administrative proceedings, to take additional evidence at the request of any party, and ultimately, to reach an independent decision based on a preponderance of the evidence. *See Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000); *Michael F.*, 118 F.3d at 252.

In reaching its independent decision, a district court's inquiry is twofold. *Rowley*, 458 U.S. at 206. First, the reviewing court must determine where the state has complied with the procedures as set forth in the IDEA. *Id.* Second, the district court must determine if the IEP developed through the IDEA's procedures is reasonably calculated to enable the child to receive educational benefits. *Id.* at 206-07. Where these requirements have been met, Supreme Court precedent holds that "the obligations imposed by Congress and the courts can require no more." *Id.*

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[9] *Adam J. ex. rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 808 (5th Cir. 2003) (quoting *Teague*, 999 F.2d at 131).

In the instant case, the Court has denied EPISD's efforts to submit additional evidence.[10] Consequently, with nothing new presented to the Court, RR's Motion for Summary Judgment simply becomes "the procedural vehicle for asking [this Court] to decide the case on the basis of the administrative record." *Heather S. v. State of Wis.*, 125 F.3d 1045, 1052 (7th Cir. 1997) (quoting *Hunger v. Leininger*, 15 F.3d 664, 669 (7th Cir. 1994)); *see also R.H.*, 2008 WL 906289, at *3 (citations omitted) (holding that where "the parties concur that [there] is no need for additional evidence or discovery . . . . the Court will determine the merits of the case based on the administrative record"); *Austin Indep. Sch. Dist. v. Robert M.*, 168 F. Supp. 2d 635, 638 (W.D. Tex. 2001) (finding that where "no party to this proceeding . . . . requested the Court to hear additional evidence, a motion for summary judgment is simply a procedural vehicle for asking the Court to decide the case on the basis of the administrative record").

Despite being termed summary judgment, the district court must reach its decision based on the

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[10] After allowing EPISD to submit a proposed list of additional evidence and witnesses, the Court found as follows:

> [N]either the exhibits nor the witnesses present competent evidence to supplement the administrative record. To the contrary, both represent rebuttal evidence to [RR] and Berry's request for attorney fees. Such evidence has a defined point of entry in the pleading time line of the Western District of Texas, which this Court will not deviate from. As a consequence, the Court must deny, in its entirety, the admission of EPISD's proposed exhibits.

Court Order, Jan. 29, 2008, at 14.

preponderance of the evidence. *Hunger*, 15 F.3d at 669. Procedurally, however, the text of the IDEA remains silent on the allocation of the burden of persuasion.[11] *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005). Thus, to offer guidance to the district courts, the Supreme Court has held that "[a]bsent some reason to believe that Congress intended otherwise . . . . the burden of persuasion [in an IDEA case] lies where it usually falls, upon the party seeking relief." *Id.* at 57-58. Nonetheless, because the Motion presently before the Court seeks to determine the rights of two separate, consolidated suits, wherein both parties seek separate relief, the issue of where the burden of persuasion should fall presents an issue of first impression.

1. Standard for a consolidated IDEA case

The present action involves two separate claims under the IDEA. EPISD has exercised its right to district court review of the SEHO's decision. *See* 20 U.S.C. § 1415(i)(2)(A). RR has invoked the right to seek attorney fees as a prevailing party under the IDEA. *See* 20 U.S.C. § 1415(i)(3). Now, having consolidated both these causes of action into the same case, RR seeks a summary adjudication of his entitlement to attorney fees, which necessarily involves a finding by this Court as to whether he is a prevailing party under the IDEA.[12] Plainly stated, RR's

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[11] Because the Court will decide this case based solely on the administrative record, there exists no burden of production. *See Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005).

[12] Under the IDEA, the Court may *only* grant attorney fees to a "prevailing party." 20 U.S.C. § 1415(i)(3)(B)(i).

entitlement to attorney fees remains contingent on a favorable review of the SEHO's decision.

The Court finds that the only logical way to dispose of these countervailing claims is to first complete its review of the SEHO's decision. Under normal conditions, a district court may grant summary judgment where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c) (2008); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Warfield v. Byron*, 436 F.3d 551, 557 (5th Cir. 2006). The statutory framework of the IDEA, however, narrows the district court's ability to take on evidence from the "pleadings, the discovery and disclosure materials on file, and any affidavits" allowed by Rule 56(c) down to "the records of the administrative proceedings, additional evidence at the request of a party." *See* 20 U.S.C. § 1415(i)(2)(C).

In addition, the weight of extant case law acts to limit the IDEA's additional evidence provision and place the entry of additional evidence within the discretion of the district court.[13] Therefore, when the

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[13] Although the Fifth Circuit has yet to delineate the contours of the IDEA's additional evidence provision, a number of other courts have already decided this issue. The First Circuit, the Eighth Circuit, the Ninth Circuit, and the Eleventh Circuit utilize the *Burlington* standard in determining the extent of record supplementation allowed under the IDEA's additional evidence provision. *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773, 790 (1st Cir. 1984); *see Indep. Sch. Dist. No. 283 v. S.D. ex rel. J.D.*, 88 F.3d 556, 561 (8th Cir. 1996) (citing to First Circuit precedent and

district court has disallowed additional evidence, as it has in the instant case, the case most resembles a traditional review of an administrative decision, wherein "[i]t is a bedrock principle of judicial review that a court reviewing an agency decision should not go outside of the administrative record." *Goonsuwan v. Ashcroft*, 252 F.3d 383, 391 n.15 (5th Cir. 2001) (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985)).

For the purposes of the instant administrative review,[14] EPISD has contested the SEHO's decision. Thus, while granting due weight to the SEHO's decision, Supreme Court precedent also directs this Court to place the burden of persuasion upon EPISD

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stating that parties need "solid justification" for supplementing the administrative record); *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1472-73 (9th Cir. 1993) (stating that "additional" evidence means supplemental and does not authorize witnesses at trial to repeat or embellish their prior administrative testimony); *Walker County Sch. Dist. v. Bennett ex rel. Bennett*, 203 F.3d 1293, 1299 (11th Cir. 2000) (construing "additional" in the ordinary sense of the word and holding that the IDEA additional evidence provision does not authorize witnesses at trial to repeat or embellish their prior administrative hearing testimony).

[14] The Court has no desire to depict all IDEA appeals as simple matters of administrative review. In fact, the unique processes, statutory framework, and standard of review in IDEA cases precludes such categorization. Nonetheless, where no additional evidence will be presented to create an issue of material fact, a motion for summary judgment under the IDEA simply functions to trigger the Court's review of the administrative record. *See Heather S.*, 125 F.3d at 1052 (citations omitted).

as the challenging party.[15] Following this "virtually de novo" review,[16] the Court can then turn to the issue of who, as a prevailing party, may make a claim for attorney fees under the IDEA.

B. Analysis

Combining EPISD's First Original Complaint and its Response to RR's Motion for Summary Judgment, the Court discerns five direct challenges to the SEHO's decision.

First, EPISD argues that the SEHO "erred as a matter of law in allowing [RR] to proceed with [his] request for a due process hearing and refusing to dismiss the complaint based on ripeness, standing and mootness." Pl. EPISD's First Original Compl. 6. Second, EPISD avers that the SEHO should have dismissed RR's action due to RR's failure to exhaust his administrative remedies. *Id.*; Def. EPISD's Resp. 8-10. Third, it posits that a limitations bar precludes RR's claims before September 26, 2005. Def. EPISD's

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[15] Generally, the party seeking relief under the IDEA bears the burden of persuasion. *Schaffer*, 546 U.S. at 57-58 (holding that "the burden of persuasion [in an IDEA case] lies where it usually falls, upon the party seeking relief"). Furthermore, the party challenging the outcome of a SEHO's decision bears the burden of *proof. Heather S.*, 125 F.3d at 1052 (citations omitted); *see Salley v. St. Tammany Parish Sch. Bd.*, 57 F.3d 458, 467 (5th Cir.1995); *Michael F.*, 118 F.3d at 248; *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 624 (6th Cir. 1990); *Karl ex. rel. Karl v. Bd. of Educ. Of Geneseo Cent. Sch. Dist.*, 736 F.2d 873, 877 (2d Cir. 1984). Under these precedents, EPISD clearly bears the burden of demonstrating error in the SEHO's decision.

[16] *See Adam J.*, 328 F.3d at 808.

Resp. 10-14. Fourth, EPISD postulates that the SEHO's "determination and factual findings that [EPISD] never provided notice of its refusal to evaluate [RR], nor provided a copy of the procedural safeguards to the parents is legally erroneous." Pl. EPISD's First Original Compl. 6. Fifth, it argues that the SEHO's "determination and factual findings that [EPISD] violated . . . . its Child Find[17] obligations by failing to identify [RR] or provide for an evaluation in 2005 is legally erroneous, contradictory, and unsupported by a preponderance of the evidence." *Id.*[18]

Although EPISD also presents several challenges to the award of attorney fees to RR, the Court reiterates that such arguments have a "defined point of entry in the pleading time line of the Western District of Texas, which this Court will not deviate from."[19] Court Order, Jan. 29, 2008, at 14. In keeping

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[17] Child Find refers to the requirement that states identify, locate, and evaluate children with disabilities and develop practical methods "to determine which children with disabilities are currently receiving needed special education and related services." *See* 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111 (2006).

[18] This argument incorporates EPISD's argument that the SEHO erred in finding that EPISD "should have referred [RR] for special education testing is erroneous and unsupported by a preponderance of the evidence." Pl. EPISD's First Original Compl. 6.

[19] The Local Rules of the Western District of Texas incorporate a precise approach to determining awards of attorney fees. In pertinent part, Local Rule CV-7(i) states that "[a]ll motions for an award of attorney's fees shall be filed and served no later than fourteen (14) days after entry of judgment pursuant to Rule 54 of the Federal Rules of Civil Procedure." W.D. TEX. LOC. R. CV-7(i).

with this time line, the Court will do no more at this juncture with attorney fees than determine a prevailing party. Recognizing these limitations, the Court will limit the present order to a review of the merits of the SEHO's decision. To that end, the Court will address each of EPISD's direct objections in turn.

1. The SEHO did not err as a matter of law by refusing to dismiss RR's complaint based on the doctrines of ripeness, standing, and mootness

In its Complaint, EPISD asks this Court to overturn the SEHO's decision based on the doctrines of ripeness, standing, and mootness. Pl. EPISD's First Original Compl. 6. These arguments, however, did not originate before this Court. Rather, EPISD formulated and introduced these arguments before the SEHO to no avail. AR Vol. I, 178-83. Now, facing RR's Motion for Summary Judgment, EPISD has chosen only to support its position on the issue of mootness. Because EPISD has not substantiated its arguments concerning standing and ripeness, this Court would be within its discretion to disregard these two challenges altogether. *See Smith ex rel. Estate of Smith v. United States*, 391 F.3d 621, 625 (5th Cir. 2004) (citing *Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir. 2003) (holding "that 'when evidence exists in the summary judgment record but the nonmovant fails even to refer to it in the response to the motion for summary judgment, that evidence is not properly before the district court'")); *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915 (5th Cir. 1992). Nevertheless, in the interests of adjudicating all claims in this case, the Court will address all three challenges, while only

scrutinizing the challenge premised upon the doctrine of mootness.

a. Standing

Supreme Court jurisprudence holds that standing consists of three "irreducible constitutional minimum[s]." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560. To wit, "a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Massachusetts v. E.P.A.*, 127 S. Ct. 1438, 1453 (2007) (citing *Lujan*, 504 U.S. at 560-61). As follows in this Order, the Court finds that RR suffered an actual, particularized injury traceable to EPISD, and that this Order, in fact, redresses that injury. Thus, EPISD's argument that RR lacked standing fails.

b. Ripeness

As to ripeness, the Supreme Court has explained that whether a controversy is "ripe" for judicial resolution has a "twofold aspect, requiring [a court] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 814 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-149 (1967)). The fundamental premise behind the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements," when those "disagreements" are premised on "contingent future events that may not occur as anticipated, or indeed may not occur at all."

Reno v. Catholic Soc. Servs., 509 U.S. 43, 72 (1993) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-581 (1985)). There is no abstraction or contingency to determining whether EPISD violated its obligations under the IDEA in this case. Federal statutes and case law make the adjudication of this matter quite concrete. Moreover, delaying judicial review of this matter could affect RR's ability to receive a FAPE. Hence, the Court cannot agree with EPISD's contention that RR's claims are not ripe for determination.

c. Mootness

Additionally, EPISD contends that the SEHO "erred in refusing to dismiss Plaintiff's request as moot." Def. EPISD's Resp. 6. Further, EPISD argues that "the doctrine of mootness deprived [both] the [SEHO] and this Court of jurisdiction." *Id.* To bolster this argument, EPISD highlights that the SEHO's findings of fact, which RR "expressly adopted, conclusively establish that EPISD was ready, willing, and able to provide the relief Plaintiff requested . . . . prior to Plaintiff's request for a due process hearing." *Id.* (emphasis omitted). Put another way, EPISD argues that "[b]ut for Plaintiff's refusal to accept the very relief requested, there was no live controversy for the [SEHO] to preside over in a due process hearing." *Id.* at 7. As a consequence, EPISD urges the Court to deny RR's Motion for Summary Judgment[20] and to overturn the SEHO's conclusions of law and findings of fact. Pl. EPISD's First Original Compl. 8.

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[20] Def. EPISD's Resp. 8.

In response, RR questions what EPISD claims could have mooted the case. Specifically, RR states that the settlement proposed by EPISD lacked force in either state or federal court. Pl. RR's Reply 2. According to RR, private settlements entered into as a resolution to claims filed under 20 U.S.C. § 1415(b)(6) generally "do not confer prevailing party status on the parent and thus the federal court has no continuing jurisdiction to enforce such settlement." *Id.* (citing *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 479 (7th Cir. 2003) (holding that "[t]he settlement agreement in this case does not bear any of the marks of a consent decree . . . . [t]here must be some official judicial approval of the settlement and some level of continuing judicial oversight")). As outlined by RR, the only exceptions to this lack of force in federal court arise when a settlement is reached either through the statutory mediation process or at a resolution session between the parents and the IEP team. *Id.* (citing 20 U.S.C. §§ 1415(e)(2)(F), 1415(f)(1)(B)(iii)). With regard to Texas law, RR describes the impotence of private agreements by citing to Texas Supreme Court precedent holding that the immunity of the State and its political subdivisions "is waived only by clear and unambiguous language." *Id.* (citing *Tooke v. City of Mexia*, 197 S.W.3d 325, 328-29 (Tex. 2006)); *see* TEX. GOV'T CODE ANN. § 311.034 (stating that "[i]n order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language"). Based upon this precedent and RR's claim that EPISD's settlement offer "states that there was no agreement at the resolution session and there is no mediation alleged," RR postulates that

EPISD's settlement offer, "had it been accepted, was unenforceable." Pl. RR's Reply 2.

Under the doctrine of mootness, "[a] controversy becomes moot where, as a result of intervening circumstances, there are no longer adverse parties with sufficient legal interests to maintain the litigation." *Chevron U.S.A., Inc., v. Traillour Oil Co.*, 987 F.2d 1138, 1153 (5th Cir. 1993) (citing *Mills v. Green*, 159 U.S. 651, 653 (1859)). Or, plainly stated, "a moot case presents no Article III case or controversy, and a court has no constitutional jurisdiction to resolve the issues it presents." *Goldin v. Bartholow*, 166 F.3d 710, 718 (5th Cir. 1999).

Thus, to ascertain whether the doctrine of mootness has acted to deprive either the SEHO or this Court of jurisdiction, the Court must determine whether the controversy between RR and EPISD remained live at the time RR requested a due process hearing. Were this Court to find that the controversy between the parties had been mooted, EPISD correctly asserts that the Court would neither possess the jurisdiction to "make a determination on the merits or order a consent decree that could render a part a 'prevailing party' for purposes of an award of attorney fees." *District of Columbia v. Jeppsen ex rel. M.J.*, 468 F. Supp. 2d 107, 113 (D.D.C. 2006) (citations omitted). Based upon the evidence presented, however, the Court finds no grounds to make such a finding.

To the contrary, the Court finds that a live controversy did and does exist between the parties to this suit. The Court reaches this conclusion for two reasons. First, regardless of EPISD's attempt to resolve the parties' dispute prior to the due process

hearing, the record clearly demonstrates that EPISD offered nothing more than "a private settlement" to RR. Def. EPISD's Resp. Ex A at 1. As such, RR would not qualify as a prevailing party under the statutory framework of the IDEA, nor would he be statutorily entitled to attorney fees.

i. Prevailing party status

The Fifth Circuit has ruled definitively on the subject of prevailing party status. In *Walker v. City of Mesquite, Texas*, the Fifth Circuit analyzed Supreme Court precedent on prevailing party status under 42 U.S.C. § 1983 and explained as follows:

> To qualify as a prevailing party, the plaintiff must (1) obtain actual relief, such as an enforceable judgment or a consent decree; (2) that materially alters the legal relationship between the parties; and (3) modifies the defendant's behavior in a way that directly benefits the plaintiff at the time of the judgment or settlement. *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992). Most recently, in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, the Court reaffirmed that both judgments on the merits and settlement agreements enforced through consent decrees were sufficient to create a prevailing party. 532 U.S. 598, 604 (2001). Again, the Court stated that the awarded relief for which fees were sought must materially alter the "legal relationship of the parties." *Id.* (citing *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989)).

Walker v. City of Mesquite, Tex., 313 F.3d 246, 249 (5th Cir. 2002) (citations altered for clarity).

Other circuits have echoed this reading of *Buckhannon* in the IDEA context.[21] The Seventh Circuit summarized the meaning and effect of *Buckhannon* as follows:

> In *Buckhannon*, the Supreme Court limited the meaning of the term 'prevailing party,' by rejecting the catalyst theory as a method of attaining prevailing-party status under the Americans With Disabilities Act ('ADA') and Fair Housing Amendments Act ('FHAA'). *Buckhannon*, 532 U.S. at 605. Under the catalyst theory, which had been accepted by many courts before *Buckhannon*, a plaintiff could prevail, if the plaintiff's suit was a catalyst that prompted the change that the

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[21] The Seventh Circuit has spoken clearly on the applicability of *Buckhannon* to not only the IDEA, but all fee-shifting statutes. In a 2003 decision, the court held:

> We reiterate, however, that because 'prevailing party' is a legal term of art that is interpreted consistently across fee-shifting statutes, there is a strong presumption that *Buckhannon* applies to each fee-shifting statute that awards fees to 'prevailing parties.' Consequently, for this Court to find that *Buckhannon* does not apply to the IDEA, a 'prevailing party' fee-shifting statute, the 'text, structure, or legislative history' would have to clearly indicate that in the IDEA, Congress did not intend to use the term 'prevailing party' in its traditional 'term of art' sense.

T.D. v. LaGrange Sch. Dist. No. 102, 349 F.3d 469, 475 (7th Cir. 2003).

> plaintiff sought. *Buckhannon*, however, held that a party could not be a prevailing party without receiving some sort of 'judicial imprimatur' on the charge. *Id.* Central to the Court's conclusion was its finding that the term 'prevailing party' was 'a legal term of art,' which signified that the party that had been granted relief by a court. *Id.* at 603. As examples of the type of relief necessary to attain 'prevailing party' status, the court cited a judgment on the merits and a consent decree. *Id.* at 604.

T.D. v. LaGrange Sch. Dist. No. 102, 349 F.3d 469, 474 (7th Cir. 2003) (citations altered for clarity).

Similarly, the Third Circuit has reasoned that "[a]lthough a party benefiting [sic] from a settlement agreement could be a prevailing party, the change in the legal relationship must be in some way judicially sanctioned." *John T. ex. rel. Paul T. v. Del. County Intermediate Unit*, 318 F.3d 545, 556 (3d Cir. 2003) (citing *Buckhannon*, 532 U.S. at 605). The Third Circuit went on to find judicial imprimatur where a stipulated settlement "(1) contained mandatory language; (2) was entitled 'Order;' (3) bore the signature of the District Court judge; and (4) provided for judicial enforcement." *Id.* at 558. Thus, under the holding of *Buckhannon* and the developing case law of the circuit courts, no litigant may claim prevailing party status without securing a decree or settlement bearing "judicial imprimatur." *Buckhannon*, 532 U.S. at 605.

The private settlement extended by EPISD to RR fails to meet this criterion. The face of the settlement plainly states that EPISD was willing only to offer a "private settlement," and moreover, that EPISD was

not willing to negotiate an agreed or consent order. Def. EPISD's Resp. Ex A at 1. Consequently, RR would have been denied prevailing party status and the entitlement to attorney fees which this status confers.

Standing alone, the preclusion of prevailing party status and attorney fees to RR would not serve to maintain a live case or controversy between the parties. Indeed, EPISD aptly references Supreme Court precedent that an "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990) (citing *Diamond v. Charles*, 476 U.S 54, 70-71 (1986)). Were RR's only continuing interest that of attorney fees, the doctrine of mootness would estop both the SEHO's decision and review by this Court. In this case, however, RR pressed forward with litigation to achieve not only attorney fees, but more importantly, *enforceability* of a settlement award. By proceeding in this fashion, RR followed the weight of current case law, which holds that the private settlement offered by EPISD would have lacked force in either federal or state court.

ii. RR's interest in a pathway to the federal courts

Along with defining the contours of "prevailing party" status, the *Buckhannon* decision also directs this Court as to when a federal court may enforce a settlement award. The *Buckhannon* Court spoke directly to the subject, holding first that "[p]rivate settlements do not entail the judicial approval and oversight involved in consent decrees." *Buckhannon*, 532 U.S. at 604 n.7. Because private settlements lack

the judicial imprimatur required for enforcement, the Court held that "federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal." *Id.* (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994) (holding that neither the Federal Rules of Civil Procedure nor any law provides for jurisdiction of a federal court over disputes arising out of an agreement that produces a stipulation, and further, that enforcement of a settlement requires its own basis for jurisdiction)). Therefore, without incorporation into an order of dismissal, a party seeking to enforce the terms of a settlement agreement would have to produce an independent jurisdictional basis to return to the same federal court that originally heard the case.

Here, EPISD admits that it rejected any negotiation of an agreed or consent order. Def. EPISD's Resp. Ex. A. Moreover, the private agreement that EPISD did offer to RR would have neither entered the record nor borne the judicial imprimatur necessary to enforce the award in federal court. For EPISD to then allege, as it does, that this private agreement somehow mooted the dispute between the parties is to propound the argument that RR harbored no interest in the enforceability of the settlement agreement. Yet, to do so ignores the value of the IDEA's pathway to the federal courts.

Generally, the State of Texas and its political subdivisions possess immunity from being haled into federal court by suits authorized by federal law. *See N. Ins. Co. of N. Y. v. Chatham County, Ga.*, 547 U.S. 189, 193 (2006). That immunity, however, is not absolute. First, Congress may abrogate a state's immunity from

suit when it acts under section five of the Enforcement Clause of the Fourteenth Amendment. *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 277 (5th Cir. 2005) (en banc) (citing U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.")). Second, a state may consent to suit in federal court. *Id.*

Congress made specific provision within the IDEA to condition "a state's receipt of federal IDEA funds on its consent to suit under that Act." *Id.* at 280.[22] Thus, under the IDEA, an individual may hale a school district, as a subdivision of the state, into federal court. *Id.* at 289.

Clearly, then, the IDEA offers individuals recourse to sue a state in federal court. The private agreement

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[22] The IDEA, at 20 U.S.C. § 1403(a), states that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter." The Fifth Circuit has explained that this language sought to correct the deficiencies in the language of the IDEA's predecessor, the Education of the Handicapped Act. The Supreme Court ruled that the language of that Act "lacked a sufficiently clear statement of Congressional intent to abrogate Eleventh Amendment immunity to claims under the statute." *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 280 n.31 (5th Cir. 2005) (en banc) (citing *Dellmuth v. Muth*, 491 U.S. 223, 232 (1989)). Because the IDEA's predecessor neither clearly abrogated the states' immunity nor explicitly demanded consent, Congress redesigned the IDEA in such as a way as to overtly require states to consent to suit in order to receive federal education funding. The Fifth Circuit has "consistently interpreted Supreme Court guidance as permitting such conditional spending programs, as has every other circuit that has squarely addressed the issue." *Id.* at 285 (citations omitted).

proposed by EPISD, however, would have done the opposite. In fact, by signing the agreement, RR would have surrendered his pathway to the federal courts and relied entirely on EPISD's faithful execution of the agreement. Had a breach occurred, the agreement would have left RR bereft of any recourse to hale EPISD into federal court.

iii. RR's interest in the enforceability of an agreement in Texas state court

The plain language of the Texas statutes and Texas Supreme Court precedent would have stripped RR of the ability to enforce EPISD's private agreement in the state court system as well. Under Texas law, sovereign immunity exists to "protect the State and its political subdivisions from lawsuits and liability for money damages." *Mission Consol. Indep. Sch. Dist. v. Garcia*, Nos. 05-0734, 05-0762, 05-0763, 2008 WL 821037, at *1 (Tex. Mar. 28, 2008). This immunity, although often referred to under the umbrella term of "sovereign immunity," actually consists of the distinct concepts of "sovereign immunity" and "governmental immunity." *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003). The term "sovereign immunity" refers to a state's immunity from suit and liability. *Id.* Sovereign immunity extends not only to the state, but also to the varying divisions of state government, including agencies, boards, hospitals, and universities. *Id.* (citing *Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976)). "Governmental immunity" protects political subdivisions of the state, including municipalities and school districts. *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). Both sovereign and governmental immunity deprive the Texas courts

of subject matter jurisdiction. *See Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006); *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003).

Governmental immunity, such as that which protects EPISD, has two components: immunity from liability and immunity from suit. *Tooke*, 197 S.W.3d at 332. Immunity from suit bars suit against the entity altogether. *Id.* Immunity from suit takes on particular relevance when a governmental entity enters into a contract, because that entity waives immunity from liability and voluntarily binds itself, just as any other party would, to the terms of the contract. *Id.* Nevertheless, that entity *does not* thereby waive immunity from suit. *Id.* For there to be a waiver of immunity from suit in the contract-claim context, the Texas legislature must have waived immunity from suit as to the claim in question by clear and unambiguous language. *Id.* at 332-33 (requiring clear and unambiguous language to waive governmental immunity); *see* TEX. GOV'T CODE ANN. § 311.034 (Vernon 2007) ("In order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language.").

The Texas Local Government Code ("TLGC") enumerates which entities can be considered "local government entities" for purposes of Texas law. *See* TEX. LOC. GOV'T CODE ANN. § 271.151 (Vernon 2005). In addition, the TLGC articulates when those local

government entities - including school districts[23] - waive their governmental immunity from suit. *See id.* § 271.152. By a 2005 amendment, the Texas legislature announced that local governmental entities would be amenable to contract-related claims in the following situation:

> A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating[24] a claim for breach of the contract, subject to the terms and conditions of this subchapter.

Id.

A contract, within the meaning of this subchapter, is defined as "a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity." *Id.* § 271.151(2).

Thus, to determine whether the legislature has waived a local governmental entity's immunity from

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[23] Texas law declares school districts to be local governmental entities. *See* TEX. LOC. GOV'T CODE ANN. § 271.151(3) (Vernon 2005).

[24] "Adjudication" of a claim is defined as "the bringing of a civil suit and prosecution to final judgment in county or state court and includes the bringing of an authorized arbitration proceeding and prosecution to final resolution in accordance with any mandatory procedures established in the contract subject to this subchapter for the arbitration proceedings." *Id.* § 271.151(1).

suit, Texas courts have focused on whether goods or services are being provided to the local government entity. In those cases where immunity has been waived, the courts have concluded that the contract between the parties called for some receipt of goods or services by the local governmental entity. *See Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions / Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 327 (Tex. 2006) (holding that the state's self-insurance fund was amenable to suit because it received services from the school districts, which helped elect the members of its board); *Clear Lake City Water Auth. v. Friendswood Dev. Co.*, No. 14-07-00096-CV, 2008 WL 2130435, at *11 (Tex. App. May 22, 2008) (finding that an agreement to hire third parties to build streets, roads, and bridges for a local government entity constituted sufficient provision of services to waive immunity). Conversely, the Texas courts have refused to waive immunity when the local government entity has not received goods and services. *See Somerset Indep. Sch. Dist. v. Casias*, No. 04-07-00829-CV, 2007 WL 1805533, at *2 (Tex. App. Apr. 23, 2008) (finding that a breach of contract claim filed under section 271.152 did not waive school district's immunity, because the earnest money contract at issue related to the sale of land rather than goods or services); *City of San Antonio v. Reed S. Lehman Grain, Ltd.*, No. 04-04-00930-CV, 2007 WL 752197, at *2 (Tex. App. Mar. 14, 2007) (noting that an easement dedication contract conveyed only an interest in real property, and as such, is not an agreement for providing goods and services that would waive immunity). Hence, to divest a school district of its immunity from suit, a party seeking to file suit would have to show that they had provided some good or service to the district.

RR could make no such showing. In essence, therefore, EPISD offered RR an agreement without the concomitant right to enforce it. This Court finds that the interest in that enforceability constitutes an interest sufficient, for the purposes of litigation, to create a live case or controversy. Furthermore, because the private settlement extended by EPISD simultaneously (1) denied RR prevailing party status under the IDEA and (2) precluded RR's ability to enforce the agreement in either the federal or state courts, the Court finds that a live case or controversy did and does exist between the parties to this suit.

2. Because RR properly exhausted his administrative remedies, both the SEHO and this Court possess jurisdiction

Next, EPISD argues that neither the SEHO nor this Court possess jurisdiction over this matter, as RR failed to exhaust his administrative remedies. Pl. EPISD's First Original Compl. 6; Def. EPISD's Resp. 8-10. EPISD insists that the SEHO's findings of fact "conclusively establish that the [SEHO] lacked jurisdiction to permit [RR] to proceed with a due process hearing." Def. EPISD's Resp. 8-9 (citing AR Vol. I , 7). EPISD recounts the SEHO's finding that "before [RR] requested a due process hearing, [EPISD] was prepared to begin the evaluation process and had scheduled a STAT meeting to address the parent's request for a [Full Individual Evaluation ("FIE")] and obtain the parent's consent for the initial evaluation." *Id.* at 9. Nonetheless, EPISD highlights that RR's parents failed to provide consent. *Id.* Additionally, RR's parents later cancelled the STAT meeting. *Id.* As a consequence, EPISD argues that if RR had

participated in the STAT meeting, rather than cancelling and filing for a due process hearing, "there would have been nothing left for the [SEHO] to do since the relief [granted by the SEHO] . . . . was the precise conduct the STAT committee was prepared to undertake." *Id.*

RR fails to address the argument in his Reply. Based upon the argument submitted by EPISD, the question the Court must determine is whether RR failed to exhaust his administrative remedies when he cancelled the STAT meeting provided by EPISD in favor of submitting his claims to the state-level SEHO.

The IDEA secures to every student in the State of Texas the right to a FAPE, which must be tailored to each disabled child's needs through an IEP. *See* 20 U.S.C. § 1414(d)(1)(B). These IEPs, in turn, are to be crafted, in writing, at a meeting attended by a "qualified" and "knowledgeable" school district representative, a teacher, the child's parents or guardians, and, when appropriate, the child himself. *Id.* Whenever parents have complaints about the FAPE provided by a school district, the IDEA provides that they "shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(f)(1)(A).[25]

Procedurally, parents must first address their concerns about a child's FAPE to the local school

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[25] The IDEA secures to school districts this same path to the federal courts. *See* 20 U.S.C. § 1415(f)(1)(A).

district, but if the school district has not resolved the complaint "to the satisfaction of the parents" within thirty (30) days, then the "due process hearing may occur." 20 U.S.C. § 1415(f)(1)(B)(ii).[26] Although the IDEA provides that the states may elect to administer due process hearings at either the state or local level,[27] the State of Texas has charged the Texas Education Agency ("TEA") with responsibility for implementing "a *one-tier system* of due process hearings under the IDEA." 19 TEX. ADMIN. CODE § 89.1151(b) (emphasis added). Thus, in those instances where a school district fails to resolve a parent's complaint within thirty days, parents have a direct and exclusive pathway to a due process hearing administered by the Texas Education Agency. Additionally, should the parents remain dissatisfied following the due process hearing officer's decision, they may file a civil action in state or federal district court. *See* 20 U.S.C. § 1415(i)(2)(A).

A complaint brought before a federal district court based on the IDEA is not a justiciable controversy until Plaintiffs have exhausted their administrative remedies under the IDEA or proved that exhaustion

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[26] Before proceeding to the due process hearing, however, the IDEA does demand that the parties undertake additional measures. Among these, within fifteen (15) days of receiving a complaint, the local educational agency must convene a meeting with the parents and the relevant members of the IEP team to discuss and potentially resolve the complaint. *See* 20 U.S.C. § 1415(f)(1)(B). The parties may only forgo this requirement through a written waiver or participation in the mediation process outlined by the IDEA. *See* 20 U.S.C. § 1415(f)(1)(B)(i)(IV). None of these requirements are at issue in the current litigation.

[27] *See* 20 U.S.C. § 1415(f)(1)(A).

would be futile or inadequate.[28] *Gardner v. Sch. Bd. Caddo Parish*, 958 F.2d 108, 112 (5th Cir. 1992); *see* 20 U.S.C. § 1415(i)(2)(A). To exhaust administrative remedies in the State of Texas, the IDEA and Texas Administrative Code demand only that a plaintiff undergo a due process hearing administered by the TEA. *See* 20 U.S.C. § 1415(i)(2)(A); 19 TEX. ADMIN. CODE § 89.1151(b). The relevant law contemplates neither a hearing preceding a plaintiff's path to the TEA due process hearing, nor any hearing between the TEA and a plaintiff's access to the federal courts.

Based upon the plain language of the IDEA and the Texas Administrative Code, the Court finds that RR properly exhausted all necessary administrative remedies. Although EPISD would have this Court interpret the Tenth Circuit's decision in *Ellenberg v. New Mexico Military Institute* as imposing new procedural requirements upon RR, the unique facts of *Ellenberg* mitigate against this Court transposing that expansive holding into the case at bar. *See generally Ellenberg v. New Mexico Military Institute*, 478 F.3d 1262 (10th Cir. 2007).

a. The *Ellenberg* decision

In *Ellenberg*, plaintiffs claimed that New Mexico Military Institute ("NMMI") violated the IDEA, the Americans with Disabilities Act ("ADA") and the Rehabilitation Act by denying their disabled child

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[28] In those instances where it is claimed, plaintiffs bear the burden of demonstrating the futility or inadequacy of administrative review. *Gardner v. Sch. Bd. Caddo Parish*, 958 F.2d 108, 112 (5th Cir. 1992) (citing *Honig*, 484 U.S. at 327).

entrance to the school. *Id.* at 1273. Although both parents initiated the cause as plaintiffs, the case began when Mr. Ellenberg brought his daughter, S.E., from Ms. Ellenberg's home in Florida to live with him in New Mexico. *Id.* at 1271. Shortly after the move, in 2000, Mr. Ellenberg enrolled his daughter in Los Alamos High School. *Id.* After two years of substantial behavioral problems, the Taos Municipal School District ("TMSD") prepared an IEP for S.E. stating that she required a small, structured learning environment and careful monitoring. *Id.* at 1272. The IEP developed by TMSD was to be reviewed one year from the date it was created or at the time of her discharge, whichever occurred first. *Id.*

The following year, rather than reapplying to TMSD for a renewal or review of her IEP, plaintiffs submitted S.E.'s application directly to NMMI, a military school outside TMSD's borders. *Id.* Owing in no small part to plaintiffs' disclosure of S.E.'s history of disciplinary problems, participation in a residential treatment program in Taos, and her diagnosis and related medication for Oppositional Defiance Disorder, NMMI denied her admission for the fall semester. Shortly thereafter, plaintiffs petitioned the State of New Mexico for a due process hearing against NMMI, claiming that NMMI's refusal to provide S.E. with a FAPE violated her rights under the IDEA and section 504 of the Rehabiliation Act.[29] *Id.* at 1273.

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[29] Section 504 of the Rehabilitation Act of 1973 ("section 504") prohibits discrimination against otherwise qualified disabled persons under any program or activity receiving federal financial assistance. *See* 29 U.S.C. § 794 (2006).

At the due process hearing, the hearing officer ultimately concluded that NMMI had no obligation to provide S.E. with a FAPE under the IDEA or the Rehabilitation Act, because plaintiffs failed to demonstrate that S.E. was otherwise qualified to attend NMMI. *Id.* Both sides eventually appealed the ruling, leading to a decision by the appellate hearing officer that NMMI was not a public school for purposes of the IDEA, and that plaintiffs' IDEA claim "'bordered on being wholly insubstantial and frivolous.'" *Id.* (citations omitted in original). Having exhausted the administrative hearing process, plaintiffs filed a civil

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Section 504 differs markedly from the IDEA. As outlined by an interest group for those with learning disabilities:

> The major differences between IDEA and [s]ection 504 are in the flexibility of the procedures. For a child to be identified as eligible for services under [s]ection 504, there are less specific procedural criteria that govern the requirements of the school personnel. Schools may offer a student less assistance and monitoring with [s]ection 504 because there are fewer regulations by the federal government to instruct them, especially in terms of compliance.
>
> In contrast, a child identified for services under the IDEA must meet specific criteria. The degree of regulation is more specific in terms of time frames, parental participation, and formal paperwork requirements. IDEA also addresses the special education of students with disabilities from preschool to graduation only (from ages 3 to 21). Section 504 covers the lifespan and safeguards the rights of persons with disabilities in many areas of their lives, including employment, public access to buildings, transportation, and education.

Council for Exceptional Children: Understanding the Differences Between IDEA and Section 504, http://www.ldonline.org/article/6086 (last visited Jun. 20, 2008).

action in federal court against NMMI asserting claims under the IDEA, section 504 of the Rehabilitation Act, and Title II of the ADA. *Id.*

The district court rejected plaintiffs' IDEA claim. Specifically, the district court held that nothing in the IDEA "support[s] the theory that special education is merely a service that must be provided wherever the student chooses to attend school." *Id.* (citations omitted). The district court also granted summary judgment to NMMI on the ADA and Rehabilitation Act claims, holding that "if the state satisfied its obligations under the IDEA it was not required to do more under the ADA or the [Rehabilitation Act]." *Id.*

On appeal to the Tenth Circuit, a three-judge panel found that plaintiffs failed to exhaust their administrative remedies. *Id.* at 1279. The court made this finding based on what it considered two fundamental circumscriptions of the IDEA's state focus. First, the *Ellenberg* court chided the plaintiffs for not obtaining an IEP from either of S.E.'s local educational agencies for the 2003-2004 school year. *Id.* at 1276. By the *Ellenberg* court's reasoning, the plaintiffs disregarded this requirement in favor of unilaterally determining that NMMI was their child's least restrictive learning environment. *Id.* Second, plaintiffs made no request to alter the IEP fashioned by TMSD the previous year before again deciding unilaterally that NMMI would represent their child's least restrictive learning environment. *Id.* Because the plaintiffs had neither sought out a current IEP for the school year nor requested an alteration to the previous IEP, the Tenth Circuit opined that they "had no way of deciding whether a military-style education is appropriate for S.E," and moreover, that "neither this

court nor a district court has a factual record adequate to determine if NMMI is appropriate for S.E." *Id.* at 1276-77.

The Tenth Circuit arrived at this holding by noting that "[a]lthough the [plaintiffs] characterize the relief they seek as S.E.'s admission to NMMI, their only legally cognizable injury under the IDEA is the state's failure to provide their child with a FAPE in the least restrictive environment." *Id.* at 1276. Where the issue presents itself thus, with a plaintiff claiming that the state has not provided a child with a FAPE in the least restrictive environment, the Tenth Circuit held that "the need for an IEP is especially great."[30] *Id.* Correspondingly, to obtain the required IEP, the *Ellenberg* court reasoned that the "IDEA's requirements that students receive an education in the [least restrictive environment] do not preclude a state from initially assigning students to local school districts and requiring them to seek an IEP from that school district." *Id.* at 1278. Recognizing the primacy of the state in the IDEA construct, the court concluded that "[i]t is to the states, not students, that Congress delegated authority to implement the IDEA." *Id.* (citing *Rowley*, 458 U.S. at 207-08).

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[30] As noted by the Tenth Circuit, the Supreme Court has stated that Congress envisioned the IEP "as the centerpiece of the [IDEA's] education delivery system." *Ellenberg*, 478 F.3d at 1277 (quoting *Honig*, 484 U.S. at 311).

b. The *Ellenberg* decision does not persuade this Court that RR failed to exhaust his administrative remedies

The facts of the instant case militate against applying the broad holding of the *Ellenberg* court. Fundamentally, the *Ellenberg* court dealt with the ability of parents to exercise their right to district court review. *Id.* at 1273. In the case before this Court, only EPISD appeals the findings of the due process hearing provided by the State of Texas. Thus, the Tenth Circuit's concern that students might supplant the state's authority under the IDEA does not translate. To the contrary, RR's local educational agency now seeks to overturn the state's findings through the federal courts.

Additionally, the *Ellenberg* court sought to correct what it saw as a student trying to bypass the IDEA. *See Ellenberg*, 478 F.3d at 1278. Indeed, the Tenth Circuit felt that the plaintiffs' refusal to seek a current IEP or modify their child's previous IEP prevented any federal court from making a determination as to what constituted the child's least restrictive learning environment. *Id.* at 1276-77. In the instant case, however, RR exercised his statutorily guaranteed right to a due process hearing, not to contravene the state's authority to draft his IEP, but rather, to petition the State of Texas to compel his local educational agency, EPISD, to grant him an IEP. *See* Def. Berry's Mot. to Dismiss 9.

For its part, EPISD avers that the process of developing RR's IEP was slated to begin at the STAT committee meeting cancelled by RR on September 24, 2006. Def. EPISD's Resp. 9. RR's history with EPISD's

STAT committee, however, calls the potential value of that meeting into question. The words of the SEHO presiding over RR's due process hearing state as much:

> I find that [EPISD] violated the time lines for an initial evaluation because the matter was repeatedly referred to the STAT committee. It's clear that the STAT committee was set up to provide a student support and intervention before a special education referral is made. However, in practice, the [c]ommittee is merely an obstacle to parents who want to access the special education referrals . . . . [the IDEA] gives the parent a right to seek an evaluation and overrides local district policy concerning intervening procedures.

AR Vol. I , 8.

Moreover, the evidence demonstrates that the STAT committee reviewed RR's case on numerous occasions from 2001 to 2005, and only once did the STAT committee bother to undertake the evaluation for special education to which the IDEA guaranteed RR access.[31] AR Vol. I, 5-7. Thus, while the plaintiffs in *Ellenberg* were attempting to circumnavigate the state's role in providing special education services under the IDEA, RR employed the State of Texas's due process hearing procedures to command EPISD to begin crafting his IEP. In so doing, RR called upon the authority delegated to the State of Texas by the IDEA, which the *Ellenberg* court extolled as the proper avenue for following the mandates of the IDEA. *See*

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[31] This single evaluation determined RR to *not* be eligible for special education services. AR Vol I, 5.

Ellenberg, 478 F.3d at 1278 (citing *Rowley*, 458 U.S. at 207-08). Stated plainly, the plaintiffs in *Ellenberg* sought to make their own rules for educating their child. In the case before this Court, RR petitioned the State of Texas to compel EPISD to follow the rules. Such action clearly comports with the spirit of the Tenth Circuit's decision in *Ellenberg*.

Additionally, the Court finds no compelling justification for importing the Tenth Circuit's holding in *Ellenberg* into the Western District of Texas. Under binding Fifth Circuit precedent, a plaintiff may file an IDEA claim in federal court once all administrative remedies have been exhausted or exhaustion has been proven to be futile or inadequate. *See Gardner*, 958 F.2d at 112; 20 U.S.C. § 1415(i)(2)(A). The relevant administrative remedies in Texas derive from the text of the IDEA and the Texas Administrative Code. *See* 20 U.S.C. §§ 1415(f)(1)(A), (i)(2)(A); 19 TEX. ADMIN. CODE § 89.1151(b). Notably, the text of the IDEA states that when parents have complaints about the FAPE provided by their local school district, they "*shall* have an opportunity for an impartial due process hearing," and that this hearing "*shall* be conducted . . . . as determined by State law." *See* 20 U.S.C. § 1415(f)(1)(A) (emphasis added). The affirmative rights granted by this statute make no mention of parents necessarily obtaining an IEP before pursuing their due process hearing rights. Moreover, to rule that parents *must* obtain an IEP before exercising their due process hearing rights ignores the possibility of a local educational agency abridging a child's right to an IEP through intervening bodies like EPISD's STAT committee.

Accordingly, this Court finds that RR properly exhausted his administrative remedies. Neither the IDEA nor Texas law require parental participation in EPISD's STAT committee whatsoever. Consequently, both the SEHO and this Court have jurisdiction to decide RR's case.

3. An exception to the IDEA statute of limitations allows RR to pursue some of his claims which occurred before September 26, 2005

As its third challenge to the SEHO's decision, EPISD argues that a limitations bar precludes RR's claims which occurred before September 26, 2005.[32] Def. EPISD's Resp. 10-14. EPISD bases this argument on the text of the IDEA, which provides as follows:

> A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

20 U.S.C. § 1415(f)(3)(C).

EPISD explains that the State of Texas has exercised its authority under the IDEA to implement its own

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[32] EPISD did present the affirmative statute of limitations defense before the SEHO. AR Vol. I, 163. *See also* Fed. R. Civ. P. 8(c); *F.T.C. v. Nat'l Bus. Consultants, Inc.*, 376 F.3d 317, 322 (5th Cir. 2004) ("A statute of limitations defense is an affirmative defense").

time limitation for due process hearings. Def. EPISD's Resp. 11. Specifically, the Texas Administrative Code allows that "[a] parent or public education agency must request a due process hearing within one year of the date the complainant knew or should have known about the alleged action that serves as the basis for the hearing request." 19 TEX. ADMIN. CODE § 89.1151(c). EPISD also argues that plaintiffs bear the burden to establish an exception to this one-year statute of limitations. Def. EPISD's Resp. 11 (citing 20 U.S.C. § 1415(f)(3)(D); 34 C.F.R. § 300.511(e) (reiterating the general two-year statute of limitations that states may choose to supercede)).

a. Exceptions to the IDEA statute of limitations

The IDEA does allow a narrow set of exceptions to its time limitations. First, the statute of limitations shall not apply if a parent was prevented from requesting a due process hearing due to "specific misrepresentations by the local education agency that it had resolved the problem forming the basis of the complaint." 20 U.S.C. § 1415(f)(3)(D)(i); *see* 34 C.F.R § 300.511(f)(1). In addition, the statute of limitations shall not apply where a parent failed to exercise their right to a due process hearing on account of "the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent." 20 U.S.C. § 1415(f)(3)(D)(ii); *see* 34 C.F.R § 300.511(f)(2).

This second exception addresses the IDEA requirement that school districts provide parents with "a copy of procedural safeguards" at least once a year, or upon the occurrence of one of the following events:

(i) upon initial referral or parental request for evaluation;
(ii) upon the first occurrence of the filing of a complaint under subsection (b)(6) of this section; and
(iii) upon request by a parent.

20 U.S.C. § 1415(d)(1)(A).

Following any one of these catalysts, local educational agencies incur the affirmative duty to transmit to parents a complete explanation of the IDEA procedural safeguards, written in the parents' native language, and written "in an easily understood manner." *Id.* § 1415(d)(2). This notice, which "shall include a full explanation of the [IDEA] procedural safeguards," must contain all statutory and administrative provisions relating to:

(A) independent educational evaluation;
(B) prior written notice;[33]

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[33] As outlined by the IDEA, "prior written notice" includes the following:

> (A) a description of the action proposed or refused by the agency;
> (B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
> (C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
> (D) sources for parents to contact to obtain assistance in

(C) parental consent;
(D) access to educational records;
(E) the opportunity to present and resolve complaints, including--
  (i) the time period in which to make a complaint;
  (ii) the opportunity for the agency to resolve the complaint; and
  (iii) the availability of mediation;
(F) the child's placement during pendency of due process proceedings;
(G) procedures for students who are subject to placement in an interim alternative educational setting;
(H) requirements for unilateral placement by parents of children in private schools at public expense;
(I) due process hearings, including requirements for disclosure of evaluation results and recommendations;
(J) State-level appeals (if applicable in that State);
(K) civil actions, including the time period in which to file such actions; and
(L) attorneys' fees.

Id.

Notably, this duty to give notice of procedural safeguards makes no accounting for those parents who

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understanding the provisions of this subchapter;
(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and
(F) a description of the factors that are relevant to the agency's proposal or refusal.

20 U.S.C. § 1415(c)(1).

have received repeated notices from an educational agency. Rather, the statute dictates that local educational agencies "shall" give this notice to parents on any occasion, as happened in the present case, where a parent makes a request for an evaluation. *See id.* § 1415(d)(1)(a).

Absent the application of one of these exceptions, all claims in the instant case occurring before September 26, 2005, would be barred by the relevant one-year statute of limitations. *See* 19 TEX. ADMIN. CODE § 89.1151(c).[34] For its part, EPISD ardently argues for a bar on all claims and occurrences prior to that date. Def. EPISD's Resp. 10-14. The Court now turns to ascertaining whether the SEHO erred in considering any actions occurring before September 26, 2005.

As an initial matter, the Court notes that the SEHO's decision neglects to mention the relevant Texas statute of limitations. Strikingly, the only reference to anything resembling a time limitation arises from the SEHO's notation that "[b]oth [RR] and [EPISD] questioned witnesses and presented evidence which was beyond the 2005-2006 school year pled by [RR]." AR Vol. I, 7. Based upon the SEHO's observation that RR pleaded actions for the "2005-2006" school year, the order appears to confuse the precise meaning of "one year" as contained in the Texas Administrative Code with the more amorphous term "school year." *See* 19 TEX. ADMIN. CODE § 89.1151(c). As a result, the SEHO offers no legal

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[34] RR filed his due process complaint on September 26, 2006. AR Vol. I, 4.

explanation as to why actions occurring in August 2005 should be considered along with those that occurred in September or October 2005. *See generally* AR Vol. I, 6-11. Regardless of the prominence that the term "school year" enjoys within the realm of childhood education, legal review demands a more precise application. If the SEHO found that one of the IDEA's exceptions allowed for consideration of evidence or actions occurring prior to September 26, 2005, then the SEHO's decision should have enumerated which exception, if any, applied. Because the SEHO failed to do so, it is left to the Court to ascertain if either of the IDEA's exceptions to the Texas statute of limitations allowed for consideration of matters occurring in this case prior to September 26, 2005.

i. EPISD made no specific misrepresentations to RR

Nothing in the record demonstrates that the IDEA's first exception to the Texas statute of limitations should apply. For the first of the exceptions to apply, the Court must find that EPISD made a "specific misrepresentation" to RR's parents that it had resolved the problem forming the basis of the complaint. *See* 20 U.S.C. § 1415(f)(3)(D)(i). As outlined by the SEHO, RR's four claims can be summarized as follows: (1) EPISD failed to timely evaluate RR for special education services in October 2005; (2) EPISD failed to provide RR with IDEA procedural safeguards; (3) EPISD failed to provide RR written notice of refusal to provide a special education referral; and (4) EPISD violated the Child Find provisions of the IDEA. AR Vol. I, 4. There is no evidence in the record that EPISD made any misrepresentation to RR.

ii. EPISD did prevent RR from seeking a due process hearing by failing to provide procedural safeguards

The IDEA provides for another scenario by which RR could plead actions outside the one-year statute of limitations. In relevant part, this section of the IDEA reads as follows:

> The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to the local educational agency's withholding of information from the parent that was required under this subchapter[35] to be provided to the parent.

20 U.S.C. § 1415(f)(3)(D)(ii).

The subparagraph referred to by 20 U.S.C. § 1415(f)(3)(D)(ii) states that:

> A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

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[35] The subchapter referred to here begins at 20 U.S.C. § 1411 and ends at 20 U.S.C. § 1419. Thus, the information referred to in this section includes the procedural safeguards and prior written notice required by 20 U.S.C. § 1415(d).

Id. § 1415(f)(3)(C).

Therefore, this exception, when met, operates to lift both federal and state statutes of limitations. *See id.* Recognizing this, to determine if the one-year Texas statute of limitations should be lifted, the Court must ascertain if EPISD's withholding of procedural safeguards in August 2005 prevented RR's parents from requesting a due process hearing.

As an initial matter, the Court recognizes the SEHO's two findings that EPISD failed to provide procedural safeguards to RR in August 2005 and failed to provide prior written notice in October 2005. AR Vol. I, 10. The record supports these findings.

The record also supplies no documentation of RR's parents having direct, actual knowledge of their right to a due process hearing until September 18, 2006. AR Vol. I, 772, 775 (showing that RR's father made his intention to request a due process hearing known between September 18 and 20, 2006). By that date, RR's parents had retained counsel. AR Vol. I, 7. Moreover, and as this Order will explain in a subsequent section, EPISD has made no proffer of evidence to convince this Court to impute constructive knowledge to RR's parents between August 2005 and September 2006.[36]

When a local educational agency delivers a copy of IDEA procedural safeguards to parents, the statutes of limitations for IDEA violations commence without disturbance. Regardless of whether parents later

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[36] *See* infra, section II(B)(3)(a)(iii)(c).

examine the text of these safeguards to acquire actual knowledge, that simple act suffices to impute upon them constructive knowledge of their various rights under the IDEA. Conversely, in the absence of some other source of IDEA information, a local educational agency's withholding of procedural safeguards would act to prevent parents from requesting a due process hearing to administratively contest IDEA violations until such time as an intervening source apprised them of their rights.

When EPISD withheld information from RR's parents in August and October of 2005, EPISD denied them the knowledge necessary to request a due process hearing. As a consequence, the IDEA directs that this Court "shall not apply" the Texas one-year statute of limitations to RR's claims. *See* 20 U.S.C. § 1415(f)(3)(D)(ii).

iii. The SEHO properly found that EPISD failed to provide IDEA procedural safeguards following the August 2005 request for evaluation and to provide notice of its refusal to evaluate RR in October 2005

EPISD's fourth challenge attacks the SEHO's finding that EPISD failed to provide procedural safeguards to RR's parents in August 2005 and to provide notice of its refusal to evaluate RR in October 2005. *See* Pl. EPISD's First Original Compl. 6. As to both determinations, EPISD argues that the SEHO's findings are "legally erroneous." *Id.* Furthermore, EPISD introduces three theories to rebut the SEHO's conclusion. The Court addresses these each in turn.

a. The SEHO correctly found that RR's parents requested a special education evaluation in August of 2005

First, EPISD argues that RR's parents made no request for evaluation in August of 2005. According to EPISD, "[t]he evidence establishes that [RR's parents] did not in fact request a referral, but instead raised the possibility of a referral" with Mrs. Gandara ("Gandara"), the Assistant Principal at RR's school. Def. EPISD's Resp. 13. To support this notion, EPISD cites Gandara's own notes, dated August 22, 2005, which memorialize the meeting between Gandara and RR's mother as follows, *verbatim ac litteratim*: "Parent has requested possible Sp. Ed. testing. Please Keep copies of student work, etc.. you may think is important to show (90 days)." AR Vol. I, 265.[37] Oddly, EPISD admits that it "did not ignore this 'request'; it promptly scheduled a [STAT committee] meeting to discuss referral of [RR]." Def. EPISD's Resp. 13. Furthermore, EPISD goes so far as to declare that "[Gandara] promptly acted upon this concern," and "a meeting was scheduled for October 20, 2005." *Id.*

The conflated logic of this argument exposes the shortcomings of EPISD's special education referral process. The text of the IDEA details that "a parent of a child . . . . may initiate a request for an initial evaluation to determine if the child is a child with a disability." *See* 20 U.S.C. § 1414(a)(1)(B). More

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[37] This ninety (90) day period was not chosen without cause. As noted by the SEHO, Texas law provides that school districts have "60 days from receiving parental consent to complete an evaluation, and 30 additional days to convene an ARD." AR Vol. I, 8.

importantly, the IDEA demands that either the state or a local educational agency "*shall* conduct a full and individual initial evaluation . . . . before the initial provision of special education and related services to a child with a disability under this part." *See* 20 U.S.C. § 1414(a)(1)(A) (emphasis added). Despite these affirmative duties imposed by federal statute, the SEHO explained that the STAT committee has devolved from a body meant to "provide support and intervention" to "an obstacle to parents who want to access the special education referrals." AR Vol. I, 8. Recognizing this discrepancy between federal law and EPISD's practice, the SEHO opined:

> The STAT process, while a mandatory district requirement, is not a prerequisite to conducting a special education evaluation. Upon a parental request for a special education evaluation, the campus should begin the special education evaluation process while at the same time provid[ing] intervention strategies through the STAT [c]ommittee.

AR Vol. I, 6.

Regardless of the corollary measures EPISD selects to facilitate the implementation of its IDEA obligations, the Court adopts the SEHO's finding that the IDEA "gives the parent a right to seek an evaluation and overrides local district policy concerning intervening procedures." AR Vol. I, 8. In those instances where the STAT committee impedes the exercise of rights guaranteed by federal law, those practices violate the IDEA.

In August of 2005, the STAT committee process preceded RR's ability to receive an FIE.[38] Following Gandara's meeting with RR's mother, the evidence demonstrates that Gandara went about initiating the STAT process. Although EPISD argues that the two only discussed the possibility of special education testing, fundamentally, the STAT committee itself acted to reduce a parent's federally guaranteed right to an FIE to nothing more than a possibility. As a consequence, and based upon Gandara's actions, the Court cannot agree with EPISD's argument that RR's parents made no request for evaluation in August of 2005.

b. The SEHO properly found that EPISD failed to provide written notice of its refusal to evaluate RR in October 2005

Similarly, EPISD contests the SEHO's finding that EPISD failed to provide notice of its refusal to evaluate RR in October 2005. EPISD avers that at the STAT committee meeting held on October 20, 2005, "which included [RR's] mother, all agreed that special education referral testing of [RR] was not warranted." Def. EPISD's Resp. 14 (citing AR Vol. I, 676; AR Vol. II, 125:4-126:16). According to the evidence, the October 2005 STAT committee chose to forgo special education testing in favor of a recommendation that included modifying RR's section 504 accommodations, additional tutoring, and attendance at Saturday tutoring camps. AR Vol. I, 676. Additionally, the

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[38] Or, as the SEHO found, "[f]unctionally, in this case, the STAT process became a precondition for evaluation." AR Vol. I, 9.

minutes of the STAT committee meeting, attended by RR's mother and five EPISD officials, record the committee's agreement that "special education testing is not warranted at this time." *Id.* With no rebuttal evidence from RR, the record convincingly establishes that RR's mother did agree at the October 2005 STAT committee meeting to forgo special education testing for RR.

Consequently, the question before the Court is whether parental consent to forgo evaluation, given following a school district's failure to provide IDEA safeguards, relieves the district of its obligation to provide the parent with notice of its refusal to evaluate the child. Based upon the plain text of the IDEA, the Court finds that it does not.

Under the IDEA, local education agencies are required to provide "prior written notice" to the parents of a child, whenever that agency proposes to initiate or change, or refuses to initate or change "the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child." 20 U.S.C. § 1415(b)(3). Federal regulations reflect these mandates without significant alteration. *See* 34 C.F.R. § 300.503. Nowhere in either the text of the IDEA or the federal regulations have exceptions been carved out to relieve local educational agencies of this responsibility when a parent agrees with the agency's refusal to evaluate. Furthermore, EPISD cannot overcome the suspicion that tarnishes RR's consent, as it was given without knowledge of then current IDEA safeguards. The SEHO held as much, finding that EPISD chose not to send written notice to RR "based on the mistaken belief that RR no longer wanted a special education referral." AR Vol. I, 7. Without

reaching the unnecessary conclusion as to whether this consent should be considered valid, the Court finds no support in the extant case law or federal regulations to support EPISD's position. Federal law in this regard is clear; whether parents agree to the refusal or not, local educational agencies must comply with their IDEA responsibility to provide written notice upon their refusal to evaluate a child for special education services.

c. RR was not on constructive notice of his IDEA rights

As a global argument to challenge its refusal to provide procedural safeguards in August 2005 or notice of its refusal to evaluate in October 2005, EPISD argues that regardless of its IDEA requirements, RR's parents had been placed on constructive notice of their IDEA rights. *See* Def. EPISD's Resp. 11-14. Or, as EPISD declares, "[t]he evidence clearly showed that [RR's] parents were aware of their procedural rights under the IDEA." *Id.* at 11. EPISD supports this contention by noting that RR previously received special education services from EPISD from 1997 to 1998, and that RR last received an FIE in early 2001. *Id.* (citing AR Vol. I, 172, 238-48, 534-78). Facially, the record supports this position, as EPISD's archives illustrate that RR received copies of procedural safeguards on six separate occasions between November 19, 1996, and May 7, 2001. AR Vol. I, 172-73.

Actual knowledge is defined as "direct and clear knowledge." BLACK'S LAW DICTIONARY 888 (8th ed. 2004). Unlike actual knowledge, constructive knowledge charges an individual "with knowledge of

that which in the exercise of reasonable care he should have known." *Shenker v. Baltimore & O.R. Co.*, 374 U.S. 1, 13 (1963). Regardless of the context, when a party asserts the defense of constructive knowledge, the Court's inquiry must focus on whether the party alleged to possess constructive knowledge *should have known* the information in dispute.

Despite EPISD's efforts, the Court finds insufficient support for imputing constructive knowledge to RR. Irrespective of the frequency with which EPISD provided safeguards to RR between 1996 and 2001, EPISD can point to nothing in the federal statutes or case law that would discharge its responsibility to comply with IDEA notice requirements in 2005. To the contrary, the IDEA states, without equivocation, that local education agencies *shall* provide procedural safeguards following a request for special education and *must* provide written notice of a refusal to perform a special education evaluation. *See* 20 U.S.C. § 1415(b)(3), (d)(1)(A). Had Congress not intended to reduce the complexities of the IDEA into a form that parents could easily access and take advantage of, there would be no reason for the IDEA to require the states to offer parents an exhaustive explanation of procedural safeguards, written in the native language of the parents, and "written in an easily understandable manner."[39] *See id.* § 1415(d)(2).

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[39] One federal court has recently struck down a local educational agency's copy of procedural safeguards for not being written in an easily understood manner as required by 20 U.S.C. § 1415(d)(2). *See "Makiko D." v. State of Hawaii*, No. 06-00189 JMS/BMK, 2007 WL 1152811, at *6 (D. Haw. Apr. 17, 2007).

Implicit within these detailed requirements is a recognition that reasonable individuals might not comprehend either their administrative or judicial rights in the event that a local educational agency violated its obligation to provide notice of IDEA procedural safeguards. More importantly, these notice requirements convey legislative acknowledgment that even with proper transmission of safeguards, parents still might not possess direct, actual knowledge of their rights to a due process hearing. Correspondingly, the IDEA's safeguard requirements serve another purpose beyond protecting parents by ensuring that they receive notice of their rights upon each request for evaluation. Indeed, the requirement also protects local educational agencies, as the act of transmitting those safeguards, which must be done upon each request, suffices to place parents on constructive notice of their rights to a due process hearing. The congressional intent behind such categorical imperatives is clear. More importantly, the legislative motivation underpinning these mandates demonstrates congressional recognition of the many amendments which the IDEA has undergone.[40]

Of particular relevance to RR's case, the most extensive revisions of the IDEA occurred in 2004, leading many to refer to the current IDEA as "IDEA 2004." *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2646 (2004). Requirements regarding statutes of limitations, the ability of school districts to request a

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[40] For a synopsis of the extensive revisions to the IDEA, see http://www.wrightslaw.com/idea/idea.2004.all.pdf (last visited Jun. 8, 2008).

due process hearing, and scores of additional provisions became law with the implementation of this Act in 2005. *See id.* In the exercise of reasonable care, RR might never receive notice of these amendments without an updated copy of procedural safeguards or retaining counsel. Yet, despite these sweeping transformations in the IDEA, EPISD would have this Court find that its prior provision of safeguards from 1996 to 2001 fulfilled its IDEA obligations in 2005. Put another way, EPISD would have this Court find that despite the landmark changes in the IDEA that occurred in 2004, RR should have known of the changes based on upon safeguards given from 1996 to 2001. This argument lacks both logic and merit, and as such, the Court cannot find that RR possessed constructive knowledge of his IDEA rights in Fall 2005.

Based upon the preponderance of the evidence, and giving due weight to the SEHO's findings, the Court finds that EPISD failed to provide RR with procedural safeguards in August 2005 and with notice of its refusal to evaluate RR in October 2005.

5. The SEHO properly found that EPISD violated its Child Find requirements in October 2005

Finally, EPISD seeks to overturn the SEHO's finding that EPISD violated its Child Find obligation from August to October 2005. Pl. EPISD's First Original Compl. 6. Although EPISD also challenges the SEHO's finding that EPISD should have referred RR for special education testing, the SEHO's finding that EPISD failed its Child Find obligations by not referring RR for special education testing acts to

merge these two arguments. *See id.* Therefore, the Court must determine the amalgamated issue of whether the SEHO erred in finding that EPISD failed its Child Find obligations from August to October 2005 by not referring RR for special education testing.

Congress enacted the IDEA's Child Find provisions to guarantee access to special education.[41] To that end, the IDEA's Child Find obligation imposes on each local educational agency an affirmative duty to have policies and procedures in place to locate and timely evaluate children with suspected disabilities in its jurisdiction, including "[c]hildren who are suspected of being a child with a disability . . . . and in need of special education, even though they are advancing from grade to grade[.]" 34 C.F.R. §§ 300.111(a), (c)(1); *see* 20 U.S.C. § 1412(a)(3) (imposing on each state and local educational agency the affirmative duty to identify, locate, and evaluate all children with disabilities within its jurisdiction). The Child Find duty is triggered when the local educational agency has reason to suspect a disability coupled with reason to suspect that special education services may be needed to address that disability. *Dep't of Educ., State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Haw. 2001); *see C.G. v. Five Town Cmty. Sch. Dist.*,

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[41] The comments to the regulations reflect this goal: "Child [F]ind . . . . is an ongoing activity that [school districts] should be engaged in throughout the year for all children in order to meet the statutory obligations to ensure that all children in the State are located, identified and evaluated and that all children have the right to a FAPE." 64 Fed. Reg. 48,12603 (1999). This reflects the IDEA's overall purpose "to ensure that all children with disabilities have available to them [a FAPE]." 20 U.S.C. § 1400(d)(1)(A).

No. 05-237-P-S, 2007 WL 494994, at *25 (D. Me. Feb. 12, 2007); *Kanongata'a v. Washington Interscholasic Activities Ass'n*, No. C05-1956C, 2006 WL 1727891, at *20 (W.D. Wash. Jun. 20, 2006). When these suspicions arise, the local educational agency "must evaluate the student within a reasonable time after school officials have notice of behavior likely to indicate a disability." *Strock v. Indep. Sch. Dist. No. 281*, No. 06-CV-3314, 2008 WL 782346, at *7 (D. Minn. Mar. 21, 2008) (citations omitted).

Upon judicial review, then, the Court must undertake a two-part inquiry to determine whether a local educational agency has complied with its Child Find responsibilities. First, the Court must examine whether the local educational agency had reason to suspect that a student had a disability, and whether that agency had reason to suspect that special education services might be needed to address that disability. Next, the Court must determine if the local educational agency evaluated the student within a reasonable time after having notice of the behavior likely to indicate a disability.

a. The SEHO correctly found that EPISD should have suspected RR had a disability, and that special education services might be needed to address that disability

In the present case, RR asserted before the SEHO that "based on the facts and circumstances known to [EPISD] before [RR] filed for a due process hearing, [EPISD] should have referred RR for a special education evaluation on its own initiative." AR Vol. I, 9. EPISD responded by arguing that its provision of

other services, including section 504 accommodations, tutoring, and Texas Assessment of Knowledge and Skills ("TAKS") assistance acted to fulfill its Child Find obligations. *Id.* Presented with the same evidence presently before this Court, the SEHO held that EPISD did not adhere to the Child Find requirements of the IDEA. AR Vol. I, 11.

According due weight to the SEHO's findings, and in the absence of any references whatsoever to authority or the record by EPISD,[42] the Court finds insufficient justification to overturn the finding that EPISD failed to meet its Child Find requirements. Under Fifth Circuit precedent, one of the factors used to measure whether a local educational agency has met its IDEA responsibility to provide a FAPE is whether the accommodations accorded to the student demonstrate positive academic benefits. *See Bobby R.*, 200 F.3d at 347 (citing *Michael F.*, 118 F.3d at 253). Yet, as announced in the SEHO's decision, by Spring of 2005, RR had failed the TAKS test "for *three years in a row*." AR Vol. I, 6 (emphasis in original). Moreover, RR displayed "continuing difficulties in reading, math, and science" which the SEHO found to be "clear signals that an evaluation was necessary and appropriate." *Id.* When confronted by this reality at the October 2005 STAT meeting, EPISD chose not to evaluate RR for special education services. AR Vol. I, 676.

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[42] *See Smith*, 391 F.3d at 625 (citations omitted) (holding that when a nonmovant fails to refer to evidence in the summary judgment record in the response to the motion for summary judgment, that evidence is not properly before the district court).

Instead of evaluating RR, the October 2005 STAT committee recommended modifications to RR's section 504 accommodations, additional tutoring, and attendance at Saturday tutoring camps. AR Vol. I, 676. Why EPISD's STAT committee would have suggested these measures, knowing that RR had undertaken each of these steps in the past three years and that none had helped him achieve passing TAKS scores, simply baffles this Court. *See* AR Vol. I, 9. Faced with three years of repeated failure, the Court agrees with the SEHO's finding that "[a] special education evaluation would have clearly indicated whether RR had a disability that was affecting his educational progress." *Id.* Further, the Court concurs in the finding that EPISD's "reliance on a purported agreement to continue RR in section 504 and not send the parent's referral to the special education department reflected a mistake on [EPISD's] part." *Id.*

The IDEA's mandate is clear. States and local educational agencies must identify, locate, and evaluate students who they suspect may be disabled[43] and develop methods to provide them with special education services. *See* 20 U.S.C. § 1412(a)(3)(A). Based on RR's record of consecutive failure on the TAKS test, his continuing difficulties in multiple subjects, and the inability of prior accommodations to improve his scores, the SEHO believed that EPISD had reason to suspect that RR had a disability and that special education services might be needed to address that disability. Acting on these reasonable

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[43] The Child Find obligation extends to all children suspected of having a disability, not merely to those students who are ultimately determined to be disabled. 34 C.F.R. § 300.111(c)(1).

concerns, and in keeping with its Child Find obligations, the SEHO held that EPISD should have referred RR for evaluation in October 2005. Neither the record nor EPISD's pleadings justify overturning this finding, and as such, the Court affirms this section of the SEHO's ruling.

b. The SEHO properly found that EPISD did not evaluate RR within a reasonable time after suspecting he might have a disability

The second component of the Court's Child Find inquiry requires the Court to determine if the local educational agency evaluated the student within a reasonable time after suspecting the student might have a disability. The Fifth Circuit has yet to rule on this point, and other federal courts faced with this issue have developed varying standards. *Compare New Paltz Cent. Sch. Dist. v. St. Pierre ex rel. M.S.*, 307 F. Supp. 2d 394, 401 (N.D.N.Y. 2003) (holding that a delay of approximately ten months from the time mother informed school district that son was experiencing difficulties until performance of comprehensive evaluation constituted a Child Find violation), *and Cari Rae*, 158 F. Supp. 2d at 1195-97 (finding that a delay of at least six months from point at which school had reason to suspect child had disability to scheduling of evaluation constituted a Child Find violation), *with W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir. 1995), *abrogated on other grounds by A.W. v. Jersey City Pub. Schs.*, 486 F.3d 791 (3d Cir. 2007) (holding that a delay of six months from observation of behavior until referral for evaluation constituted a triable issue as to Child Find violation), *and O.F. ex rel. N.S. v. Chester Upland Sch. Dist.*, 246

F.Supp.2d 409, 417-18 (E.D. Pa. 2002) (finding that a triable issue existed as to whether a delay of almost twelve months from observation that child was having emotional difficulties in school until completion of comprehensive evaluation constituted a Child Find violation). In following the majority of federal courts that have considered the issue, this Court finds that the thirteen months that passed between RR's request for evaluation and EPISD's offer of evaluation was unreasonable. As a result, the Court affirms the SEHO's finding that EPISD failed its Child Find obligation from August to October 2005 by not referring RR for special education testing.

III. CONCLUSION

Having granted "due weight" to the SEHO's decision, the Court finds that EPISD has failed to demonstrate, by a preponderance of the evidence, that any or all of the SEHO's findings should be overturned. To the contrary, after undertaking a "virtually de novo" review of the record, the Court finds that EPISD has failed to meet its burden of persuasion. As a consequence, the Court hereby **AFFIRMS** the SEHO's findings *in toto*.

With no remaining challenges to the merits of the SEHO's decision, the Court hereby **GRANTS** RR's Motion for Summary Judgment. Furthermore, because RR successfully prosecuted his case before the SEHO, RR secured a judgment bearing "judicial imprimatur,"[44] thereby altering the legal relationship between RR and EPISD in such a manner as to confer

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[44] *See Buckhannon*, 532 U.S. at 605.

prevailing party status upon RR. Correspondingly, RR may petition this Court for attorney fees under 20 U.S.C. § 1415(i)(3)(B).

In addition, the Court hereby **ORDERS** the following:

1. Because this Order accomplishes the remedy sought by RR's request for injunctive relief, RR's request for an affirmative injunction is **DENIED** as **MOOT**.

2. Because the evidence objected to by EPISD in its Response to RR's Motion for Summary Judgment[45] was not relied on by this Court, and because this material forms no part of this Order, these objections are **DENIED** as **MOOT**. *See Jinks v. Advanced Prot. Syss., Inc.*, 162 F. Supp. 2d 542, 545 (N.D. Tex. 2001).

3. Any remaining requests for attorney fees, and possible objections thereto, are hereby **ORDERED** to be entered pursuant to applicable Local Rules of the Western District of Texas. *See* W.D. TEX. LOC. R. CV-7(i).

SO ORDERED.

The Clerk shall close the case.

SIGNED on this 14th day of July 2008.

/s/

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[45] Def. EPISD's Resp. 3 n.4.

KATHLEEN CARDONE
UNITED STATES DISTRICT JUDGE

APPENDIX D

BEFORE A SPECIAL EDUCATION
HEARING OFFICER
FOR THE STATE OF TEXAS

No. 022-SE-0906

[January 19, 2007]

R.R. B/N/F	)
E.R.	)
PETITIONER	)
	)
VS.	)
	)
EL PASO INDEPENDENT	)
SCHOOL DISTRICT	)
RESPONDENT	)
	)

FINAL DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE STATEMENT OF THE CASE

Petitioner, R.R, by his next friend, E.R. (hereinafter Student or RR) brings this proceeding against Respondent El Paso Independent School District (hereinafter Respondent or EL Paso ISD) under the Individuals with Disabilities Education Act (hereinafter IDEA), 20 U.S.C. § 1400 *et. seq.*

Petitioner alleges that Respondent denied RR a free appropriate public education during the 2005-2006 school year based on the following claims:

1. Respondent failed to timely evaluate RR for special education services in October 2005;

2. Respondent failed to provide Petitioner with IDEA procedural safeguards;

3. Respondent failed to provide Petitioner written notice of refusal to provide a special education referral; and

4. Respondent violated the "Child Find" provisions of IDEA.

Petitioner seeks a Full Individual Evaluation (FIE), an order requiring the El Paso to provide written notice of any proposed initiation, change, or refusal to identify, evaluate, or place RR in a special education setting, an order requiring the District to provide Petitioner with procedural safeguards, an Admission, Review, and Dismissal meeting, and attorney's fees.

PROCEDURAL HISTORY

Petitioner filed her request for a due process proceeding on September 26, 2006. Petitioner was represented by Mark Berry of El Paso, Texas. Carol Helms, with the Albuquerque, New Mexico office of Walsh, Anderson, Brown, Schulze & Aldridge represented the District.

The Hearing Officer scheduled a prehearing conference for October 24, 2006, and the due process

hearing for November 9-10, 2006. On October 11, 2006, the Parties held a Resolution Meeting but were unable to obtain an agreement. On October 25, 2006, the prehearing conference was held; both Parties announced ready for hearing.

The due process hearing was held on November 9-10. At the end of the second day, the Hearing Officer requested written closing arguments and legal briefs concerning certain issues. There was general disagreement concerning certain procedural matters. In order to resolve the dispute, the Hearing Officer scheduled a third day of hearing to review the issues presented by the evidence. On November 17, 2006, a telephone continuation of the hearing was held.

At its conclusion, the Hearing Officer asked the Parties to brief certain legal issues and set a December 11, 2006, deadline for the briefs, and December 19, 2006, for Petitioner's Reply brief. Both Parties timely submitted post-hearing briefs.

Taking continuances into account, the deadline for the final decision is January 19, 2007. The Hearing Officer issued her decision on January 19, 2007.

FINDINGS OF FACT

1. RR is a 14-year-old student residing within the El Paso Independent School District. El Paso is a political subdivision of the State of Texas and a duly incorporated independent school district. Currently, RR has not been evaluated for special education services.

2. In kindergarten, RR was evaluated for speech articulation difficulties following the death his grandfather. After successful intervention, RR was dismissed from special education.

3. In 2001, during third grade, RR was again referred for special education services by his mother and teacher. That school year, RR experienced difficulties due to poor attention and concentration, disorganization, and distraction, as well as difficulty producing written work. The 2001 evaluation found that RR did not qualify for special education services. However, in November 2001, RR was referred to the Student Teacher Assessment Team (STAT) for Section 504 services. RR currently receiving accommodations through this program.

4. In the Spring 2003, while in the fifth grade, RR did not pass his Texas Assessment of Skills and Knowledge (TAKS). In the 2003-2004 school year, the Section 504 Committee noted that RR had Attention Deficient Hyperactive Disorder and provided accommodations for this.

5. During RR's sixth and seventh grade years (2003-2004 and 2004-2005 respectively), he received services under Section 504. In the Spring 2004, RR took the sixth-grade TAKS test and did not pass. In the Spring 2005, RR took the seventh-grade TAKS test and did not pass. Despite RR's inability to pass the TAKS test for *three years in a row*, the District did not refer him for a Full Individual Evaluation (FIE) or to the grade placement committee that determines whether a student will go to the next grade after failing the TAKS.

6. Long before he failed the TAKS for the third time, the District should have referred RR for a special-education evaluation. In August 2005, RR's mother asked the school to test him due to his math difficulties. In response to this request, the Assistant Principal referred Petitioner to the campus STAT Committee. The Assistant Principal wrote on RR's class schedule that "Parent has requested possible sp[ecial] ed[ucation] testing." The class schedule also had the notation of "(90 days)" indicating the time in which a school district must conduct an FIE and hold an ARD meeting to review the FIE., after receiving a request for a special education evaluation. The District did not provide Petitioner a copy of the IDEA procedural safeguards when she requested an evaluation.

7. The STAT Committee is a school-based pre-referral committee that reviews student information, implements interventions to meet the student's needs, and documents the success of the interventions. If the interventions are unsuccessful, the Committee should refer the student for a special education evaluation. The STAT handbook states that a "referral for evaluation for consideration of special education should be a last resort."

8. All students are referred to the STAT committee before they are referred for a special education evaluation. The STAT process, while a mandatory district requirement, is not a prerequisite to conducting a special education evaluation. Upon a parental request for a special education evaluation, the campus should begin the special education evaluation process while at the same time provide intervention strategies through the STAT Committee. There is no

reason that both processes cannot occur simultaneously. This did not happen in RR's case.

9. Certainly, no later than the end of August 2005 — after school personnel had received RR's TAKS scores — the District should have referred RR for special-education testing. The District's failure to do so violated the Child Find provision of IDEA. The number of times he failed the TAKS, and RR's continued difficulties in reading, math, and science were clear signals that an evaluation was necessary and appropriate.

10. The campus STAT Committee met in October 2005 to review RR's placement and Petitioner's request for an FIE. In discussing the request, the District personnel described RR as a "bubble child", meaning a student who was a few points away from passing the TAKS, and given enough chances would eventually pass the test. Petitioner never received a notice of the District's refusal to evaluate RR. Similarly, the Committee did not provide Petitioner a copy of her procedural rights because members of the Committee did not believe they had denied the evaluation. They believed Petitioner had agreed to forego the evaluation and in lieu thereof, to continue trying Section 504 services.

11. District personnel failed to follow their own STAT handbook at the October 2005 meeting. The District did not initiate a special education referral while trying new alternative strategies. The STAT Committee process and the referral request for a special education evaluation could co-exist and provide a student needed intervention strategies while awaiting the results of the evaluation.

12. In September 2006, the District set up a STAT meeting to address the parents' request for an FIE and to get th parent's consent for the initial evaluation. The day of the meeting, the parents canceled the meeting and a few days later filed their request for a due process hearing. In September 2006, El Paso was prepared to begin the evaluation process, but RR's parents failed to provide consent.

13. Both Petitioner and Respondent questioned witnesses and presented evidence which was beyond the 2005-2006 school year pled by Petitioner. Both Parties presented evidence on the first few months of the 2006-2007 school year.

DISCUSSION

The IDEA entitles every student with a disability to receive a free appropriate public education (FAPE). The United States Supreme Court established a two-prong test for determining whether a school district provided a free appropriate public education. The first inquiry is whether the district complied with IDEA procedural requirements. The second inquiry is whether the student's education program is reasonably calculated to confer an educational benefit. *Board of Education of Hendricks Hudson Central School District v. Rowley*; 459 U.S. 176,102 S.Ct. 3034 (1982).

Petitioner alleges that Respondent violated the procedural guarantees of IDEA pertaining to an evaluation referral, notice of procedural safeguards, and notice of the District's refusal to provide a service. Under IDEA, procedural violations warrant a finding that a school has failed to provide a free appropriate public education only when they result in the loss of

educational opportunity, i.e. result in substantive harm, or seriously infringe on a parent's opportunity to participate in the ARD process. *Adam J. v Keller ISD*, 328 F.3d 804 (5th Cir. 2003).

I. Timely Evaluation

The IDEA's referral process requires that all children referred for an evaluation receive certain procedural safeguards. While IDEA does not set time limits for completing an initial evaluation, Texas has implemented standards ensuring that initial evaluations are conducted within a reasonable time. In Texas, a district has 60 days from receiving parental consent to complete an evaluation, and 30 additional days to convene an ARD.

The weight of the credible evidence shows that the District received Petitioner's request for referral in August 2005. It is clear that RR's parents were frustrated by his lack of progress on the TAKS and that they were concerned about his math skills. After four years of failing the TAKS and with high school a year away, the parents were seeking a different alternative than that offered by the STAT Committee.

I find that the District violated the time lines for an initial evaluation because the matter was repeatedly referred to the STAT Committee. It's clear that the STAT Committee was set up to provide a student support and intervention before a special education referral is made. However, in practice, the Committee is merely an obstacle to parents who want to access the special education referrals. I agree with the District that referrals should not be taken lightly and a student should be provided intervening strategies

before being referred for a special education evaluation. IDEA, however, gives the parent a right to seek an evaluation and overrides local district policy concerning intervening procedures.

I find that the District has the obligation to conduct an evaluation in a timely manner, and in August 2005, it failed to do so.

In September 2006, the District indicated that it would refer RR for a special education evaluation. By then, the parents were refusing to cooperate with the District. At the hearing, the District asserted that once it received Petitioner's request for an evaluation in September 2006, it was prepared to conduct the evaluation and needed parental consent to do so. By then, the parents had hired an attorney and filed a due process hearing request.

II. Child Find

Both federal and state law require a school district to identify, locate, and evaluate all children with disabilities residing within its jurisdictional boundaries. This rule is known as the "child find" provision. 20 U.S.C. Sec. 1414(a)(l)(A).

The "child find" provision requires a school district to have procedures in place to ensure that "All children with disabilities ..., and who are in need of special education and related services, are identified, located, and evaluated." This provision imposes an affirmative duty on the school district to seek out and identify students with disabilities. Although parents may request a referral for such services, they are not required or obligated to do so. The parents' lack of

referral does not alleviate the District's obligation to look for children who may qualify for special education services. 34 C.F. R. §300.125 (a)(1) and (2).

In the present case, Petitioner asserts that based on the facts and circumstances known to the District before Petitioner filed for a due process hearing, the District should have referred RR for a special education evaluation on its own initiative. The District counters that it complied with the "child find" provision by providing RR services through Section 504, providing needed services such as tutoring, TAKS assistance, and, in the past, special education services. I am asked to determine whether the "child find" duty required the District to refer RR for a special-education evaluation at an earlier date and, if so, the date by which such referral was required. Whether RR should have qualified for special-education services at an earlier date, or whether the student ever qualifies for special-education services, is not relevant to this determination.

The persuasive evidence of RR's educational progress, or the lack thereof, is his failure to pass the TAKS for four years and his problems with math. It's highly unlikely that in August 2005, after receiving his failing TAKS scores, RR's parents would not ask for an evaluation. District personnel believed that if RR attended more tutoring, he would not have trouble in math and would pass the TAKS.

This is a student who, in the past, participated in tutoring, TAKS reading classes, and TAKS Saturday camp. It is difficult to understand why district personnel believed that if RR simply attended more tutoring, his poor grades would improve and he'd pass

the TAKS. An special education evaluation would have clearly indicated whether RR had a disability that was affecting his educational progress or whether he was merely a "bubble child".

The District's reliance on a purported agreement to continue RR in Section 504 and not send the parent's referral to the special education department reflected a mistake on the District's part. Testimony from all district personnel showed that the STAT process was not a necessary pre-referral process to begin an special education referral. Functionally, in this case, the STAT process became a precondition for evaluation. As a result, the District did not run both processes simultaneously as anticipated by the STAT handbook.

The Hearing Officer concludes that RR is entitled to a Full Individual Evaluation based on the District's failure to identify him in August 2005. The District did, however, meet its child find obligation in September 20, 2006 when it offered to conduct an evaluation.

III. Written Notice of District's Refusal to Provide a Service

Petitioner alleges that the District's October 2005 refusal to refer RR for special education services triggered the requirement for the District to provide a §300.503 notice. The newly adopted federal regulations require districts to provide written notice to the parent when the district refuses to initiate, inter alia, the identification or evaluation of the child.

At the October 2005 STAT meeting, district personnel believed that RR's parents were in

agreement to continue the Section 504 services. Based on the mistaken belief that Petitioner no longer wanted a special education referral, the District did not send a written notice of refusal to provide a special education evaluation. The District should have performed both their STAT responsibilities and sent the referral to special education.

The Hearing Officer concludes that the District failed to send Petitioner the required written notification of its refusal to provide a special education referral.

IV. Failure to Provide Procedural Safeguards

Federal regulations require that the parent be provided with notice of procedural safeguards "upon initial referral for evaluation." The District never provided Petitioner a copy of the procedural safeguards during the 2005-2006 . Since RR was never referred for an initial evaluation, Petitioner never received a copy of the procedural safeguards.

The Hearing Officer concludes that when the request for a special education evaluation was made by Petitioner and discussed by the STAT Committee, the District should have provided Petitioner with a copy of the procedural safeguards as required by federal regulations.

V. Relief

Petitioner seeks an order requiring the District to provide RR a full and individual evaluation, a notice of her procedural rights, an order to convene an ARD to review the FIE, and an order requiring the District to

provide written notice of any proposed initiations, changes or refusals.

Based on the evidence in this matter, I find that Petitioner's request should be granted. Petitioner is entitled to an Order requiring El Paso ISD to conduct an FIE, to hold an ARD meeting to review the FIE, and to provide Petitioner with a copy ofthe procedural safeguards.

CONCLUSIONS OF LAW

1. El Paso ISD, as a local education agency and political subdivision of the State of Texas, is subject to requirements of IDEA, 20 U.S.C. §1400 et seq., and its implementing federal and state regulations.

2. RR has resided within El Paso ISD at times relevant to the claims in this due process hearing and is entitled to a free, appropriate public education from the District.

3. The District did not adhere to the IDEA04 "Child Find" requirements. 20 U.S.C. §1412(a)(3)(A) and (B).

3. The District failed to provide Petitioner IDEA procedural safeguards during the October 2005 STAT meeting concerning parents' request for special education.

4. The District failed to provide written notice of refusal to provide a special education referral.

5. The District failed to timely initiate an evaluation following receipt of the parent's August 2005 referral for special education services.

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, this Hearing Officer hereby **ORDERS** that the relief sought by Petitioner is hereby **GRANTED IN PART AND DENIED IN PART.**

IT IS HEREBY **ORDERED** that Respondent shall convene an ARDC as soon as practical, but no later than ten school days from the date of this decision, to provide RR a full individual evaluation, to review and discuss the suspected areas of disability, and to review the consent for initial evaluation and the related testing. Respondent shall complete the FIE and the written report no later than 10 school days from the date of the ARD meeting. After the evaluation is complete, but no later than five school days from the date of its completion, Respondent is ordered to convene an ARD meeting to review the FIE.

IT IS FURTHER ORDERED that Petitioner shall provide consent for an initial evaluation at the initial ARD meeting held in accordance with this Order, but no later than one school day after the meeting. If Petitioner fails to provide the consent for an initial evaluation, El Paso ISD shall be relieved of its obligation to evaluate until Petitioner provides her consent. Once the consent is provided, the time lines provided in this Order shall apply.

All other and further relief not expressly granted herein is hereby **DENIED.**

IT IS FURTHER ORDERED that El Paso I.S.D. shall timely implement this decision within 10 school days in accordance with 19 TAC §89.1185(q) and 34 CFR §300.514. The following must be provided to the Division of Complaints Management at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this decision: (1) documentation demonstrating that the decision has been implemented; or (2) if the time line set by the Hearing Officer for implementing certain aspects of the decision is longer than 10 school days, the District's plan for implementing the decision within the prescribed time line, and a signed assurance from the superintendent that the decision will be implemented.

Finding that the public welfare requires the immediate effect of this Final Decision and Order, the Hearing Officer makes it effectively immediately, pursuant to 19 Tex. Admin. Code §157.5(n).

SIGNED and ENTERED this 19th of January 2007.

/s/_____
Olivia B. Ruiz
Special Education Hearing Officer

NOTICE TO THE PARTIES

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision made by the Hearing Officer, or the performance thereof by any other party, may bring a

civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States, as provided in 20 United States Code (USC), §1415(i)(2). A civil action brought in state or federal court under 20 USC, §1415(i)(2) must be initiated not more than 90 days after the date the Hearing Officer issues his or her written decision in the due process hearing. 19 Tex. Admin. Code §89.1185(p).